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No. _____

In The

Supreme Court of the United States

October Term, 1994

JERRY WAYNE TILLEY,
SUSAN WELLS TILLEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the forfeiture of property as drug "proceeds" under Title 21 U.S.C. § 881(a)(6) constitutes "punishment" for Fifth Amendment double jeopardy purposes, so as to preclude a subsequent criminal prosecution for the same underlying offenses?

2. Whether Petitioners waived any argument that the forfeited property could be characterized as anything other than "proceeds" under § 881(a)(6), when:

    1. The Court of Appeals affirmed the District Court's finding that the property was "instrumentalities" utilized in drug trafficking,

    2. The forfeiture complaint alleged alternatively that the property was forfeitable because it was "utilized" to facilitate drug trafficking *or* was "proceeds" from the sale of drugs,

    3. The order of forfeiture did not distinguish upon which basis the property was forfeited, and

    4. Two of the Petitioners framed this issue on appeal as involving forfeitures based upon both "use" and "proceeds", and all complained about the lack of any opportunity to litigate same?

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The Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above proceeding on March 23, 1994. The Petition for Rehearing and Suggestion for Rehearing En Banc was denied May 11, 1994.

REFERENCE TO OPINIONS IN THE CASE

The judgment and opinion of the Fifth Circuit Court of Appeals is reported as ***U.S. v. Tilley***, 18 F.3d 295 (5th Cir. 1994) at page 1 of the appendix hereto. The Fifth Circuit denied Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc on May 11, 1994. See: ***U.S. v. Tilley***, 22 F.3d 1096 (5th Cir. May 11, 1994) at page 13 of the appendix hereto. The opinion of the District Court is ***U.S. v. Tilley***, ___ F. Supp. ___, No. 3: 92-CR-417-G (N.D. Tex. April 29, 1993) at page 14 of the appendix hereto.

GROUNDS FOR JURISDICTION

This Court has jurisdiction to issue a writ of certiorari in this case under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

WITH BASIS FOR JURISDICTION IN THE COURT OF FIRST INSTANCE

This petition seeks review of the Fifth Circuit's opinion affirming a Trial Court's final order denying these

Petitioners' Motion to Dismiss their Indictment on grounds that the forfeiture of their property constituted "punishment" for Fifth Amendment double jeopardy purposes, so as to preclude subsequent criminal prosecution for the same underlying criminal offenses. The district court had jurisdiction pursuant to the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and ***U.S. v. Dixon***, 125 L.Ed.2d 556 (1993); ***U.S. v. Dinitz***, 424 U.S. 600 (1976); and ***U.S. v. Halper***, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989). The Fifth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 which authorizes appeals from the final order of a district court. See: ***Abney v. U.S.***, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).

Petitioners were indicted on October 8, 1992 for allegedly running a marijuana distribution operation out of a used car lot in Dallas, Texas. Over a year earlier, on July 25, 1991, the United States filed a civil forfeiture complaint ***in rem*** in a different court within that same district, alleging the same facts, the same scheme of illegal activity, and the same underlying criminal statutory violations which were later charged in the indictment. Complaint for Forfeiture [at appendix p. 21].

The civil forfeiture complaint was based on a fifty-seven page affidavit by Special Agent Tim Gushwa. That same affidavit was also used as the basis for the search warrant in the criminal case. Defendant's Exhibit PBH #2. When the government filed the indictment in this case, more than a year later, it tracked the same Gushwa affidavit. See: Indictment.

On February 8, 1993, a final judgment was entered in the forfeiture proceedings, assessing the punitive forfeiture of over $650,000.00 in money and property. See: Settlement Agreement [at appendix p. 48] and Final Judgment [at appendix p. 62]. The Petitioners thereafter filed a Motion to Dismiss the indictment, pursuant to ***U.S. v. Halper***, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989) and ***Austin v. U.S.***, 125 L.Ed.2d at 488 (1993), on the ground that the previous final judgment of forfeiture barred any further prosecution for these same offenses.

On April 29, 1993, the Honorable A. Joe Fish, of the United States District Court for the Northern District of Texas, Dallas Division, in a six-page memorandum opinion, denied the Motion to Dismiss without a hearing. See: ***U.S. v. Tilley***, ___ F. Supp. ___ (N.D. Tex. 1993) [at appendix p. 14] finding that these properties were forfeited as either having been "used" or were the "proceeds" of drug transactions and were therefore "instrumentalities" of such crimes which do not constitute "punishment" for Fifth Amendment double jeopardy purposes.

Petitioners timely filed a Notice of Appeal and a Motion to Stay Proceedings Pending Appeal. Finding that the Motion to Dismiss was not frivolous, the District Court stayed all further proceedings pending the resolution of the appeal by the Fifth Circuit Court of Appeals, on the condition that Petitioners would move for expedited appeal. See: Order Granting Stay on April 29, 1993 [at appendix p. 87]. The Petitioners did so move and the Fifth Circuit granted their motion.

On March 23, 1994 the Fifth Circuit denied the Petitioners relief holding, in direct contradiction of its prior

holding in *Wood v. U.S.*, 863 F.2d 417 (5th Cir. 1989) [at appendix p. 88] five years earlier, that the forfeiture of drug proceeds is "wholly remedial" and does "not constitute punishment" for double jeopardy purposes. The Tilleys petitioned the Fifth Circuit for a panel rehearing and filed a suggestion for rehearing *en banc*. Both were denied on May 11, 1994. See: *U.S. v. Tilley*, 22 F.3d 1096 (5th Cir. May 11, 1994) [at appendix p. 13].

REASONS FOR GRANTING THE WRIT

I. WHETHER THE FORFEITURE OF PROPERTY AS DRUG "PROCEEDS" UNDER TITLE 21 U.S.C. § 881(a)(6) CONSTITUTES "PUNISHMENT" FOR FIFTH AMENDMENT DOUBLE JEOPARDY PURPOSES, SO AS TO PRECLUDE A SUBSEQUENT CRIMINAL PROSECUTION FOR THE SAME UNDERLYING OFFENSES?

The Fifth Circuit Panel Opinion holding that "the forfeiture of drug proceeds . . . serves wholly remedial purposes" and "does not constitute punishment" for double jeopardy purposes, completely ignores the very specific criteria recently established by this Court in *Austin v. U.S.*, 509 U.S. ___ (1993) for determining whether a forfeiture constitutes "punishment", namely:

1. The "historical understanding of forfeiture generally as punishment",
2. The "clear focus of this forfeiture provision on the culpability of the owner", and
3. The legislative history indicating "Congress understood this provision as serving to

deter and to punish". ***Austin v. U.S.***, 509 U.S. ___ (1993).

"Fundamentally, even assuming that §§ 881(a)(4) and (a)(7) serve some remedial purpose, the Government's argument must fail. '[A] civil sanction that cannot fairly be said ***solely*** to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.' ***Halper***, [emphasis in original]. In light of the historical understanding of forfeiture as punishment, the clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish, we cannot conclude that forfeiture under §§ 881(a)(4) and (a)(7) serves solely a remedial purpose. We therefore conclude that forfeiture under these provisions constitutes 'payment to a sovereign as punishment for some offense. . . . ' " ***Austin v. U.S.***, 509 U.S. ___, 125 L.Ed.2d 488, 505, 113 S.Ct. ___ (1993).

SAME CONSIDERATIONS COMPEL FINDING THAT "PROCEEDS" FORFEITURES CONSTITUTE "PUNISHMENT"

The very same considerations, which compelled this Court to conclude that §§ 881(a)(4) and (a)(7) were at least in part "punitive", demand that same conclusion with respect to § 881(a)(6).

HISTORICALLY *ALL* STATUTORY *IN REM* FORFEITURES CONSTITUTE "PUNISHMENT"

While dealing specifically with §§ 881(a)(4) and (a)(7), this Court made clear that all ***forfeitures generally***,

and statutory *in rem* forfeitures, in particular, are "punitive" for ***Halper*** analysis.

> "We conclude, therefore, that ***forfeiture generally*** and ***statutory in rem forfeiture in particular*** historically have been understood at least in part, as punishment." ***Austin v. U.S.***, 125 L.Ed.2d 488, 493 (1993).

Even more recently, this Court held that Montana's marijuana tax constituted "punishment" for Fifth Amendment double jeopardy purposes, even though taxes "are usually motivated by revenue-raising rather than punitive purposes." In doing so, this Court distinguished "fines, penalties, ***and forfeitures*** [which] ***are readily characterized as sanctions.***" (emphasis supplied) ***Department of Revenue of Montana v. Kurth Ranch***, 114 S.Ct. 1937, 1946 (1994).

TEST IS WHETHER FORFEITURE SERVES *IN PART* TO "PUNISH"

In that regard, this Court took considerable pain to make clear that the "relevant question" for the purpose of ***Halper*** analysis is "whether forfeiture serves ***in part*** to punish", noting that the fact that a forfeiture may serve some other purposes as well does not effect the question of whether same constitutes "punishment".

> "[T]he relevant question . . . [u]nder ***US v. Halper*** . . . is whether forfeiture serves ***in part*** to punish, and one need not exclude the possibility that forfeiture serves other purposes to reach that conclusion." (emphasis in original) ***Austin v. U.S.***, 125 L.Ed.2d 488, 503 n.12 (1993).

Emphasizing this point, the *Austin* majority reiterated that "even assuming [these forfeiture statutes] serve some remedial purpose, the Government's argument must fail. '[A] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, is punishment, as we have come to understand the term.' *Halper*", [emphasis in original] *Austin v. U.S.*, 509 U.S. ___, 125 L.Ed.2d 488, 505, 113 S. Ct. ___ (1993).

IF STATUTORY *IN REM* FORFEITURES DID NOT "PUNISH", THERE WOULD BE NO NEED FOR AN "INNOCENT OWNER" DEFENSE

This Court recognized that there would be no need for protection of the "innocent owner" if these forfeiture statutes did not punish the owner whose property is being taken.

> "If forfeiture had been understood not to punish the owner, there would have been no reason to reserve the case of a truly innocent owner. Indeed, it is only on the assumption that forfeiture serves in part to punish that the Court's past reservation of that question makes sense." *Austin v. U.S.*, 125 L.Ed.2d 488, 502 (1993).

In deciding whether §§ 881(a)(4) and (a)(7) forfeitures are "properly considered punishment today", this Court concentrated on the fact that both of those provisions "expressly provide an 'innocent owner' defense" which "serve to focus the provisions on the culpability of the owner in a way that makes them look more like punishment, not less." *Austin v. U.S.*, 125 L.Ed.2d 488, 503 (1993).

> ***"We turn next to consider whether forfeitures under 21 U.S.C. §§ 881(a)(4) and (a)(7) are properly considered punishment today.*** We find

nothing in these provisions of their legislative history to contradict the historical understanding of forfeiture as punishment. ***Unlike traditional forfeiture statutes, §§ 881(a)(4) and (a)(7) expressly provide an 'innocent owner' defense.*** See § 881(a)(4)(C) ("no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner"); § 881(a)(7) ("no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner"); see also: ***United States v. 92 Buena Vista Avenue, Rumson,*** . . . (noting difference from traditional forfeiture statutes[1]). ***These exemptions serve to focus the provisions on the culpability of the owner in a way that makes them look more like punishment, not less.*** In ***United States v. United States Coin & Currency . . . we reasoned that 19 USC § 1618, which provides that the Secretary of the Treasury is to return the property of those who do not intend to violate the law, demonstrated Congress' intent 'to impose a penalty only upon those who are significantly involved in a criminal enterprise.' . . . The inclusion of innocent owner defenses in §§ 881(a)(4) and (a)(7) reveals a similar congressional intent to punish only***

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[1] The "difference" noted by this Court in ***Buena Vista*** was between § 881(a)(6)'s "proceeds" forfeiture and "traditional forfeiture statutes".

> ***those involved in drug trafficking." Austin v. U.S.***, 125 L.Ed.2d 488, 503-504 (1993).

The identically worded "innocent owner defense" contained in the "proceeds" forfeiture provisions of § 881(a)(6)[2], which this Court previously noted has generated this "novel" and "important expansion of governmental power", should be given the same import as that in §§ 881(a)(4) and (a)(7). The "inclusion of innocent owner defenses in [§ 881(a)(6) 'proceeds' forfeiture] reveals a similar congressional intent to ***punish*** only those involved in drug trafficking." ***Austin v. U.S.***, 125 L.Ed.2d 488, 503-504 (1993).

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[2] Compare the language of the "innocent owner defense" contained in § 881(a)(4);

> "except that – no ***conveyance*** shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner."

And that contained in § 881(a)(7):

> "except that – no ***property*** shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner."

With the "innocent owner defense" contained in § 881(a)(6) dealing with "proceeds" forfeiture:

> "except that no ***property*** shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner."

HISTORICALLY THERE IS EVEN MORE REASON TO CHARACTERIZE "PROCEEDS" AS "PUNISHMENT"

There is even greater reason to characterize the forfeiture of "proceeds" as "punishment" than other property which may have been used to "facilitate" a drug offense.

As this Court made clear in ***Buena Vista***, there was no forfeiture of "proceeds" at common law.

> "[W]e are not aware of any common-law precedent for tracing proceeds traceable to an unlawful exchange as a fictional wrongdoer subject to forfeiture. . . . " ***U.S. v. 92 Buena Vista***, ___U.S. ___, 113 S.Ct. 1126, 1135 (1993).

Moreover, the "original provisions of the 1970 [forfeiture] statute", like the early piracy and revenue law, "generally authorized the forfeiture of property ***used*** in the commission of criminal activity, and . . . contained no innocent owner defense." ***U.S. v. 92 Buena Vista***, ___ U.S. ___, 113 S.Ct. 1126, 1135 (1993).

> "They applied to stolen goods, but they did not apply to the ***proceeds*** from the sale of stolen goods." ***U.S. v. 92 Buena Vista***, ___ U.S. ___, 113 S.Ct. 1126, 1135 (1993).

It was not until the 1978 Amendments to the Comprehensive Drug Abuse Prevention and Control Act of 1970, that Congress for the ***first time*** provided for the forfeiture of "proceeds"[3], and at the same time also provided an "express and ***novel*** protection for innocent

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[3] The Fifth Circuit's suggestion that "the wrongdoer has nothing, at least nothing to which the law entitles him, to lose from the possible confiscation of the proceeds from his criminal trade", at p. 300, overlooks the fact that prior to the 1978 amend-

owners", by which only the "proceeds" owned by guilty individuals could be subject to forfeiture.

> "The decision by Congress in 1978 to amend the Comprehensive Drug Abuse Prevention and Control Act of 1970, . . . to authorize the seizure and forfeiture of proceeds of illegal drug transactions . . . also marked an important expansion of governmental power. Before that amendment, the statute had authorized forfeiture of only the illegal substances themselves and the instruments by which they were manufactured and distributed. The original forfeiture provisions of the 1970 statute had closely paralleled the early statutes used to enforce the customs laws, the piracy laws, and the revenue laws: they generally authorized the forfeiture of property used in the commission of criminal activity, and they contained no innocent owner defense. They applied to stolen goods, but they did not apply to the proceeds from the sale of stolen goods. Because the statute, after its 1978 amendment, does authorize the forfeiture of such proceeds and also contains an express and novel protection for innocent owners, we approach the task of construing it with caution." ***U.S. v. 92 Buena***

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ment "proceeds" of an illegal transaction were not forfeitable, while the vehicle used to facilitate the transaction was.

> "Before the amendment, the statute had authorized forfeiture of only the illegal substances themselves and the instruments by which they were manufactured and distributed. . . . They generally authorized the forfeiture of property used in the commission of criminal activity. . . . They applied to stolen goods, ***but they did not apply to the proceeds*** from the sale of stolen goods." ***U.S. v. 92 Buena Vista***, ___ U.S. ___, 113 S.Ct. 1126, 1135 (1993).

Vista, ___U.S. ___, 113 S.Ct. 1126, 1127, 1135 (1993).

Thus, under these new amendments, which for the first time provided for the forfeiture of "proceeds" and an "innocent owner" defense, only those individuals who are themselves guilty will suffer punishment. That is precisely what this Court focused upon in ***U.S. v. U.S. Coin & Currency***, 401 U.S. 715, 718 (1971) when it held:

> " '[P]roceedings instituted for the purpose of declaring the forfeiture of a man's property ***by reason of offenses committed by him***, though they may be civil in form, are in their nature criminal' for Fifth Amendment purposes. . . . From the relevant constitutional standpoint there is no difference between a man who 'forfeits' $8,674 because he has used the money in illegal gambling activities and a man who pays a 'criminal fine' of $8,674 as a result of the same course of conduct. In both instances, money liability is predicated upon a finding of the owner's wrongful conduct; in both cases, the Fifth Amendment applies with equal force." (emphasis in original) ***U.S. v. U.S. Coin & Currency***, 401 U.S. at p. 718

And again, in ***Austin v. U.S.***, 125 L.Ed.2d 488, 503-4 (1993), this Court held that "[t]he inclusion of innocent-owner defenses in §§ 881(a)(4) and (a)(7) [like the identically worded § 881(a)(6)] reveals a similar ***congressional intent to punish*** only those involved in drug trafficking." (emphasis supplied)

Surely, the statute that had "expanded governmental power" to provide for the forfeiture of heretofore nonforfeitable "proceeds" and had originated this "novel" protection for "innocent owners" should be given a similar import[4].

ONE LOT EMERALD CASE IS INAPPOSITE

For this same reason the Fifth Circuit panel's reliance upon ***One Lot Emerald Cut Stones v. U.S.***, 409 U.S. 232 (1972), [at appendix p. 1] is misplaced. This Court's decision in ***One Lot Emerald Cut Stones*** simply does not support their conclusion that "[t]he forfeiture of proceeds of illegal drug sales serves the wholly remedial purposes of reimbursing the government for the costs of detection, investigation, and prosecution of drug traffickers" as well as "reimbursing society" for every ill from "combatting the allure" and rehabilitating the victims of illegal drugs,

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[4] As Justice Scalia noted in his concurrence, ***all*** statutory forfeitures under § 881(a) constitute "punishment":

> "However the theory may be expressed, it seems to me that this taking of lawful property must be considered, in whole or in part, see ***United States v. Halper***, 490 US 435, 448, 104 L.Ed.2d 487, 109 S.Ct. 1892 (1989), punitive. . . .
>
> "[T]his statute, in contrast to the traditional in rem forfeiture, ***requires*** that the owner not be innocent – that he have some degree of culpability for the 'guilty' property. . . . Statutory forfeitures under § 881(a) are certainly payment (in kind), to a sovereign as punishment for an offense." (emphasis in original) ***Austin v. U.S.***, 125 L.Ed.2d 488, 507-508 (1993), Scalia, J., concurring.

to somehow compensating for society's "lost productivity".[5] 18 F.3d at pp. 299-300 [at appendix p. 1]. As one Court recently noted:

> "The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear." ***United States v. Solivan,*** 937 F.2d 1140 (6th Cir. 1991) [quoting ***United States v. Monaghan,*** 741 F.2d 1434 (D.C. Cir. 1984), *cert. denied,* 470 U.S. 1085 (1983)].

Unlike the forfeiture statute in question here, ***One Lot Emerald Cut Stones*** dealt with a Customs statute which permitted the forfeiture of property for regulatory violations, regardless of any underlying criminal conduct or the guilt or innocence of the claimant.[6] In fact, the claimant in ***One Lot Emerald Cut Stones*** had been acquitted of the criminal charges, and this Court took considerable pain to note that under the Customs statute, there in question, there was no requisite for any "determination that any criminal law [had] been violated." ***One Lot Emerald Cut Stones v. U.S., supra,*** 409 U.S., at p. 236 and n.6.

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[5] In support of certain of these estimated costs to society the Fifth Circuit panel cites everything from a 1989 London ***Financial Times*** article to a 1991 Reuter Library Report, and then extrapolates these "overlapping estimates . . . on a national level" to "indicate a rough proportionality" of the "resulting governmental and societal costs in this case." 18 F.3d at p. 299.

[6] Noting that same "prevents forbidden merchandise from circulating in the United States." ***One Lot Emerald Cut Stones v. U.S.,*** 409 U.S. 232, 237 (1972).

This Court expressly distinguished cases, such as the one now before it [under 21 U.S.C. § 881(a)(6), or subsections (a)(4) and (a)(7) for that matter], where the forfeiture statutes required a determination that the criminal law had been violated.

> "But as ***Boyd v. United States*** . . . makes clear, 'proceedings instituted for the purpose of declaring the forfeiture of a man's property ***by reason of offenses committed by him***, though they may be civil in form, are in their nature criminal'. . . .
>
> "***One 1958 Plymouth Sedan v. Pennsylvania***, 380 US 693 . . . is likewise inapposite for it dealt with a forfeiture that could not be had without a 'determination that the criminal law has been violated' ". (emphasis in original) ***One Lot Emerald Cut Stones v. U.S., supra***, 409 U.S., at p. 236 and n.6.

In fact, while this Court in ***Austin*** does mention ***One Lot Emerald Cut Stones*** in passing, it goes on in that very same paragraph to cite ***U.S. v. Ward***, 448 U.S. 242 (1980) for the proposition that forfeitures generally have "absolutely no correlation to any damages sustained by society or to the cost of enforcing the law." ***Ward, supra,*** at p. 254.

> "The Court made this very point in ***Ward***: the 'forfeiture of property . . . [is] a penalty that ha[s] absolutely no correlation to any damages sustained by society or to the cost of law enforcement.' " ***U.S. v. Ward***, 448 U.S. 242, 254 (1980).

Perhaps even more important, is the fact that while this Court in ***Austin*** does speak to "the dramatic variations in the value of conveyance and real property forfeitable under §§ 881(a)(4) and (a)(7)", it goes on to distinguish the "fixed-penalty provision" at issue in ***Halper*** from any form of forfeiture generally, noting that:

> "Furthermore, as we have seen, forfeiture statutes historically have been understood as serving not simply remedial goals but also those of punishment and deterrence." ***Austin v. U.S.***, 125 L.Ed.2d 488, 505, n.14 (1993).

LEGISLATIVE HISTORY AND THE "VICE AGAINST PROSECUTORIAL SELF-CONTRADICTION"

In determining that "Congress understood" that the forfeiture provisions of 21 U.S.C. §§ 881(a)(4) and (a)(7) "serv[ed] to deter and punish", this Court in ***Austin*** recognized that:

> "The legislative history of § 881 confirms the punitive nature of these provisions. When it added subsection (a)(7) to § 881 in 1984, Congress recognized 'that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs . . . ' " ***Austin v. U.S.***, 125 L.Ed.2d 488, 504 (1993).

This Court went on to note that when it served its purpose, the Government had "quoted the same passage with approval in its brief in [another case] ***United States v. 92 Buena Vista Avenue, Rumson.***" ***Austin v. U.S.***, 125 L.Ed.2d 488, 504, n.13 (1993).

Likewise, the Legislative History of § 881(a)(6) makes clear that when Congress expanded forfeitures to include "proceeds" in 1978 the Joint House and Senate Committee expressly and specifically recognized the "penal nature" of same.

> "The . . . [1978] Amendment expands . . . the Act [§ 881(a)(6)] to provide for the forfeiture of the following additional types of property: (1) All monies, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for illicit controlled substances, (2) All proceeds traceable to such an exchange for illicit controlled substances, and (3) All moneys, negotiable instruments, and securities used or intended to be used to facilitate any controlled substance law violations. ***Due to the penal nature*** of forfeiture statutes, it is the intent of these provisions that property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity which the statute seeks to prevent. Specifically, the . . . Amendment provides for the forfeiture of property exchanged or intended to be exchanged in an illegal drug transaction. In addition it provides for forfeiture of property which is the proceeds of an illegal drug transaction. . . . Finally, it should be pointed out that no property would be forfeited . . . to the extent of the interest of any innocent owner of such property." Joint Explanatory Statement of Titles II and III, 124 Cong. Rec. S17647 ***reprinted in*** 1978 U.S.C.C.A.N. 9518. [at appendix p. 108].

This Court, in ***Austin,*** cites and quotes this language as part of the legislative history ["See also Joint House-Senate Explanation of Senate Amendment to Titles II and

III of the Psychotropic Substances Act of 1978, 124 Cong. Rec. 34671 (1978) (noting 'the penal nature of forfeiture statutes')"]. *Austin v. U.S.*, 125 L.Ed.2d 488, 504 (1993).

When it served its purpose, this same Government argued, to the very same panel of the Fifth Circuit that decided this case, that "proceeds" forfeiture under § 881(a)(6) was aimed at "deterring and punishing criminal activity":

> "Although forfeiture under ***21 U.S.C. § 881(a)(6)*** is a civil sanction, the economic penalty it imposes is nevertheless ***directed at deterring and punishing criminal activity***" (emphasis supplied) ***Government's Brief***, Department of Justice, at 28, ***Wood v. U.S.***, Docket No. 88-3088. [at appendix p. 112].

And five years ago the very same Fifth Circuit Panel below, in an opinion expressly recognizing that "we are bound by a prior decision of this court", quoted the very same Legislative History cited by this Court in ***Austin***, to hold that a proceeds forfeiture under § 881(a)(6) "cannot seriously be considered anything other than an economic ***penalty for drug trafficking***." ***Wood v. U.S.***, 863 F.2d 417, 421 (5th Cir. 1989).

> "Finally, [Defendant] boldly argues that . . . the [§ 881(a)(6)] forfeiture constituted a remedial civil sanction rather than a criminal penalty. We disagree. . . .
>
> "Forfeiture cannot seriously be considered anything other than an economic penalty for drug trafficking. ***Holt*** observed that '[t]he primary purpose of such forfeitures is to cripple illegal drug trafficking and narcotics activities by depriving narcotics peddlers of the operating

> tools of their trade.' . . . The legislative history of 21 U.S.C. § 881 reveals that the forfeiture provision was designed to reach drug traffickers 'where it hurts most,' . . . and to augment 'the traditional criminal sanctions of fines and imprisonment.' " *Wood v. U.S.*, 863 F.2d 417, 421 (5th Cir. 1989).

Despite this conclusion, that "proceeds forfeiture" under § 881(a)(6) "cannot seriously be considered anything other than an economic penalty for drug trafficking", *Wood v. U.S.*, 863 F.2d 417, 421 (5th Cir. 1989), the very same panel, comprised of the same three Judges, held below that "the forfeiture of drug proceeds [under § 881(a)(6)] serves wholly remedial purposes" and "does not constitute punishment". *U.S. v. Tilley*, 18 F.3d 295, 297 and 299 (5th Cir. 1994). Even more surprising, the Court of Appeals below not only fails to distinguish their prior opinion to the contrary in *Wood v. U.S., supra*, they completely ignore same, and the fact their own prior conflicting opinion had been vigorously briefed and argued.

Lastly, this Court noted in *Austin* that with respect to §§ 881(a)(4) and (a)(7) "Congress has chosen to tie forfeiture directly to the commission of drug offenses." *Austin v. U.S.*, 125 L.Ed.2d 488, 504 (1993). That is precisely what the Legislative History of the 1978 Amendment creating "proceeds" forfeiture states it was intended to do:

> "*[I]t is the intent of these provisions that property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity which the statute seeks to prevent.* Specifically, the . . . Amendment provides for the forfeiture of property

> exchanged or intended to be exchanged in an illegal drug transaction. In addition it provides for forfeiture of property which is the proceeds of an illegal drug transaction . . . " Joint Explanatory Statement of Titles II and III, 124 Cong. Rec. S17647 ***reprinted in*** 1978 U.S.C.C.A.N. 9518. [at appendix p. 108].

In fact, in ***Austin***, this Court cites this same legislative history of § 881(a)(6) ["See also Joint House-Senate Explanation of Senate Amendment to Titles II and III of the Psychotropic Substances Act of 1978, 124 Cong. Rec. 34671 (1978)"] in support of the conclusion that §§ 881(a)(4) and (a)(7) are "punitive". ***Austin v. U.S.***, 125 L.Ed.2d 488, 504 (1993).

RECENT DECISIONS ARE IN ACCORD

CIVIL FORFEITURES ARE "PUNITIVE" FOR FIFTH AMENDMENT DOUBLE JEOPARDY PURPOSES

This Court has recently reiterated that *all* forfeitures "are readily characterized as sanctions." ***Department of Revenue of Montana v. Kurth Ranch***, 114 S.Ct. 1937, 1946 (1994).

> "Whereas fines, penalties, ***and forfeitures*** are readily characterized as sanctions, taxes are typically different because they are motivated by revenue-raising rather than punitive purposes." ***Department of Revenue of Montana v. Kurth Ranch***, 114 S.Ct. 1937, 1946 (1994).

Relying upon this Court's decisions in ***Halper, Austin, Kurth Ranch***, the Texas Court of Appeals in ***Fant v. State***, No. A14-94-00013-CR, slip op. p. 2 (Tex. App. – Houston [14th Dist.] July 21, 1994) [at appendix p. 115]

held that forfeitures under chapter 59 of the Texas Code of Criminal Procedure "punish" and therefore bar subsequent criminal prosecutions for the same offenses, regardless whether the property was "used in the commission" of an offense, or constituted "the proceeds gained from the commission" of such an offense.

> "The teaching of ***Halper*** is that if a sanction serves the goals of punishment, namely retribution and deterrence, even if it has remedial goals as well, then it should be characterized as punishment for purposes of a double jeopardy analysis. ***Halper***, 490 U.S. at 448. **See also *Austin***, 113 S.Ct. at 2910 n.12; ***Kurth Ranch***, 62 U.S.L.W. at 4432. We find that although Chapter 59 may have remedial goals, **see** Article 59.06(c), (h) (providing that funds derived from forfeitures under the statute be used for law enforcement purposes, and programs for treatment of drug abuse and chemical dependency), it must be characterized as punitive, based on the factors delineated in ***Austin***. **Contra *Ward v. State***, 870 S.W.2d 659 (Tex. App. – Houston [1st Dist.] 1994, pet. ref'd); ***Johnson v. State***, No. 01-93-1077-CR (Tex. App. – Houston [1st Dist.] June 23, 1004, no pet.h.). Therefore, in light of the above Supreme Court decisions, we must conclude that appellant has already been punished for his criminal conduct by the forfeiture of his property, and the Double Jeopardy Clause of the United States Constitution prohibits further punishment by the State for the same incident." ***Fant v. State***, No. A14-94-00013-CR, slip op. p. 2 (Tex. App. – Houston [14th Dist.] July 21, 1994) [at appendix p. 115].

Similarly, the Louisiana Court of Appeals has "reasoned that the forfeiture of derivative contraband is not remedial" and constitutes "punishment" for Fifth Amendment double jeopardy purposes. ***State v. 1979 Cadillac Deville***, 632 So.2d 1221, 1228 (La.App. 1994) [at appendix p. 127].

Section 881(a) "proceeds" forfeitures "cannot fairly be said ***solely*** to serve a remedial purpose". The "historical focus of forfeiture generally is on punishment", and like §§ 881(a)(4) and (a)(7), the clear focus of § 881(a)(6) "proceeds" forfeiture is on the culpability of the owner. This was the very provision that created the "novel" concept of an "innocent owner defense", predicating forfeitability upon the culpability of the owner. And, just as this Court found with respect to §§ 811(a)(4) and (a)(7) in ***Austin***, the "legislative history of § 881 confirms the punitive nature" of the 1978 Amendment creating "proceeds" forfeiture.

The very same panel of the Fifth Circuit so found almost five years ago, and gives no explanation why it now ignores its own clear precedent or the very specific criteria for deciding this issue recently set out by this Court in ***Austin***. Like its counterparts, § 881(a)(6) forfeitures constitute punishment for ***Halper*** Fifth Amendment double jeopardy purposes.

II. WHETHER PETITIONERS WAIVED ANY ARGUMENT THAT THE FORFEITED PROPERTY COULD BE CHARACTERIZED AS ANYTHING OTHER THAN "PROCEEDS" UNDER § 881(a)(6), WHEN:

1. THE COURT OF APPEALS AFFIRMED THE DISTRICT COURT'S FINDING THAT THE PROPERTY WAS "INSTRUMENTALITIES" UTILIZED IN DRUG TRAFFICKING,
2. THE FORFEITURE COMPLAINT ALLEGED ALTERNATIVELY THAT THE PROPERTY WAS FORFEITABLE BECAUSE IT WAS "UTILIZED" TO FACILITATE DRUG TRAFFICKING *OR* WAS "PROCEEDS" FROM THE SALE OF DRUGS,
3. THE ORDER OF FORFEITURE DID NOT DISTINGUISH UPON WHICH BASIS THE PROPERTY WAS FORFEITED, AND
4. TWO OF THE PETITIONERS FRAMED THIS ISSUE ON APPEAL AS INVOLVING FORFEITURES BASED UPON BOTH "USE" AND "PROCEEDS", AND ALL COMPLAINED ABOUT THE LACK OF ANY OPPORTUNITY TO LITIGATE SAME?

In affirming the District Court's finding that these properties were forfeited as "instrumentalities" for their "illegal use", ***U.S. v. Tilley***, ___ F. Supp. ___, No. 3-92-CR-417-G (April 29, 1993) [at appendix p. 14], the Fifth Circuit Court of Appeals nonetheless concluded that the forfeited property constituted "proceeds" of illegal drug sales. ***U.S. v. Tilley***, 18 F.3d 295, 297 and n.2 (1994).

The District Court had found that the property was "instrumentalities".

> "The government also maintains that the defendants' real property, both business and residential, was integrally involved in the distribution operation. Specifically, it is alleged that the marijuana was repackaged and weighted before shipment at one of the defendants' properties and that it was usually picked up for delivery from one of their residences. . . . The Court agrees with the government's position and with the holding of the Ninth Circuit in ***United States v. McCaslin***. . . . When property is subject to forfeiture for violation of the law, illegal use of the property immediately vests title to the property in the government, irrespective of the existence of legal proceedings." See: ***U.S. v. Tilley***, ___ F. Supp. ___, No. 3-92-CR-417-G (April 29, 1993) [at appendix p. 14].

The forfeiture complaint alleged both that the property was "utilized" to facilitate drug trafficking and was "proceeds" from the sale of "drugs".

> "COMES NOW the United States of America, by and through the United States Attorney for the Northern District of Texas, and for its complaint *in rem* against defendants, to wit; . . . the 'properties,' in a cause of action for forfeiture for breach of the provisions of Title 21, United States Code, Section 881(a)(6) and 881(a)(7). . . . " See: Complaint for Forfeiture [at appendix p. 21].

And the order of forfeiture did not distinguish upon which basis the property was forfeited.[7]

> "After consideration of the stipulation this Court finds that the Plaintiff had probable cause to seize, arrest, and file forfeiture proceedings against the defendant properties which are the subject of this lawsuit, with the exception of

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[7] Counsel pointed this out to the District Court and asked for a hearing on the matter:

> "[T]here is nothing in the stipulated judgments of forfeiture, in the complaint for forfeiture or in the – I'm sorry. Stipulated Agreed Forfeiture and then the Final Agreed Forfeiture. There is nothing in any of those documents that tells us exactly why these are forfeited. There is nothing that says these are being forfeited as instrumentalities of a crime. That's one reason we requested a hearing on this motion, is because it would be interesting to learn how the government perceives cash and monetary instrumentalities and bank accounts to be instrumentalities of a crime. These are proceeds, your Honor, which is an entirely different proceeding from instrumentalities under (a)(6) and (a)(7) both, 881 (a)(6) and 881 (a)(7). Things can be forfeited as instrumentalities. The problem is it's not specific enough in the court's order to tell us whether these are forfeitures of instrumentalities or proceeds." See: Hearing on Motion for Stay based upon Plea in Bar Motion [at appendix at page 104].

The Government responded that these Petitioners should have to try their case in order to obtain the very double jeopardy protections which were designed to prevent such consequences.

> "Secondly, he says we've got to find out what happened here and the facts of what the scope of this is. You do that by trying the case I think." See: Hearing on Motion for Stay based upon Plea in Bar Motion [at appendix at page 104].

> Property, All Appurtenances, and Improvements Located at 5743 Ranchero Lane, Dallas, Dallas County, Texas. . . . Therefore, it is ORDERED, ADJUDGED AND DECREED that . . . of the defendant properties are hereby forfeited to the United States." See: Final Judgment of Forfeiture [at appendix p. 62].

Finally, two of the Petitioners framed this issue on appeal as involving forfeitures based both upon "use" and "proceeds":

> "Substantial property was seized from Appellants and forfeited to the government based on the allegation that this property was either **used** in connection with drug offenses or was the **proceeds** of drug offenses. The Appellants contend that this forfeiture proceeding constitutes a double jeopardy bar to a later criminal prosecution based on the same conduct." Appellants' Brief [Anderson], at p. 8.

Other Petitioners argued that:

> "The parties here stipulated *only* that the property was forfeitable, not what portion of the property was derived from drug 'proceeds', or whether any 'facilitation' of a drug offense was merely 'incidental' to another, primarily lawful use (such as the ranch or yacht examples discussed at oral argument).
>
> "As the Trial Court below pretermitted any showing with respect to these matters, despite written and oral requests on the record to permit same [Tr., p. 19, l.22-p. 20, l.15]:
>
> > '[Counsel for Appellants:] There is nothing that says these [items of property] are being forfeited as instrumentalities of a crime.

> That's one reason we requested a hearing on this motion, . . . The problem is it's not specific enough in the Court's order to tell us whether there are forfeitures of instrumentalities or proceeds.' [Tr. at pp. 19-20]
>
> "There was no evidence developed as to the double jeopardy claims." See: Petitioners (Tilley) Post-Submission Letter Brief, ***U.S. v. Tilley***, 93-1394 at pages 1-2 and Transcript of Hearing on Motion for Stay based upon Plea in Bar, April 29, 1993, ***U.S. v. Tilley***, No. 3-92-CR-417-G [at appendix p. 104].

The Court of Appeals erred in finding on appeal that this forfeited property was "proceeds" of the sales of controlled substances, that these Petitioners "waived" any argument to the contrary, or at least by not remanding this issue for a hearing thereon.

CONCLUSION

These forfeitures "cannot fairly be said ***solely*** to serve a remedial purpose." The "historical focus of forfeiture generally is on punishment." Like §§ 881(a)(4) and (a)(7), the clear focus of § 881(a)(6) "proceeds" forfeiture is on the culpability of the owner. This was the very provision that created the "novel" concept of an "innocent owner defense", predicating forfeitability upon the culpability of the owner. And, just as this Court found with respect to §§ 881(a)(4) and (a)(7) in ***Austin***, the "legislative history of § 881 confirms the punitive nature" of the 1978 Amendment creating "proceeds" forfeiture. The very same panel of the Fifth Circuit so found almost

five years ago, and gives no explanation why it now ignores its own clear precedent in that circuit and makes no mention of the very specific criteria for deciding this issue recently set out by this Court. As this Court noted:

> "[W]e do not share [the] pragmatic view . . . that the meaning of the Double Jeopardy Clause depends upon our approval of its consequences." ***U.S. v. Dixon***, 125 L.Ed.2d 556; 570-1, n.4 (1993).

This case presents a substantial question of first impression as to whether a prior "civil" forfeiture constitutes "punishment" for double jeopardy purposes, so as to preclude a subsequent criminal prosecution based upon the same illegal conduct. An issue ripe for decision by the Supreme Court.

Respectfully Submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1394

(Filed March 23, 1994)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TOMMY ROSS ANDERSON,
SARAH JANE ANDERSON,
JERRY WAYNE TILLEY, AND
SUSAN WELLS TILLEY,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

Before JOHNSON, JOLLY, and JONES, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

In this appeal, the defendants seek dismissal of their criminal indictment for selling illegal drugs on grounds of double jeopardy. They argue that the prior civil forfeiture of the proceeds from these drug sales constitutes punishment for the crimes charged in the indictment and that the Double Jeopardy Clause precludes a second punishment. The district court, refusing to buy into the defendants' double jeopardy argument, denied their motion to dismiss the indictment. The defendants then filed this interlocutory appeal. Because we hold that the

forfeiture of unlawful proceeds of illegal drug sales does not constitute punishment, we affirm the district court.

I

In 1990, the Drug Enforcement Agency, and other authorities, began an investigation of large-scale activities involved in this case, which had yielded millions of dollars in drug proceeds. On July 25, 1991, the government filed a complaint for civil forfeiture *in rem* against certain personal and real property belonging to the defendants pursuant to 21 U.S.C. §§ 881(a)(6) and (a)(7).[1] On October 8, 1992, the government issued a criminal

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[1] The relevant subsections provide in part:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter. . . .
>
> (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter. . . .

21 U.S.C. §§ 881(a)(6) and (a)(7) (1988).

The government alleged that the personal property forfeited was either the cash proceeds of drug sales or traceable to those proceeds.

indictment charging the defendants for the various drug crimes committed from 1986 to 1991. On February 5, 1993, the four defendants in this case entered into a stipulated forfeiture agreement with the United States. They agreed to forfeit significant amounts of cash, certificates of deposit, automobiles, and other personal property with a total value of approximately $650,000. Based on the stipulated agreements, the district court, on February 8, entered [sic] final judgment of forfeiture with respect to the personal property; however, the court stayed forfeiture proceedings with respect to defendants' two homes pending outcome of the criminal trial.[2] On April 7, the defendants filed a motion to dismiss the indictment on grounds that they were being subjected to multiple punishments for the same crimes in violation of the Double Jeopardy Clause. The defendants argued that they had already been "punished" for the same drug trafficking in the civil forfeiture proceeding. The district court rejected the argument and denied the motion.[3] The defendants

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[2] The final order of forfeiture did not specify whether the cash, securities, and other personal property constituted proceeds of illegal activities or personal property used in drug trafficking. The complaint sought forfeiture under 21 U.S.C. § 881(a)(6) of proceeds and property traceable to proceeds of illegal drug sales, and under § 881(a)(7) of real property used to facilitate drug trafficking. By arguing on appeal that the personal property forfeited was the proceeds of illegal drug trafficking or directly traceable thereto, the defendants have waived any argument that the forfeited property was anything but proceeds. *See In the Matter of Texas Mortgage Servs. Corp.*, 761 F.2d 1068, 1073-74 (5th Cir. 1985).

[3] The district court ruled without the benefit of the Supreme Court's subsequent decision in *Austin v. United States*, ___ U.S. ___, 113 S.Ct. 2801, 122 L.Ed.2d 347 (1993).

then filed this interlocutory appeal pursuant to *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).

II

The Double Jeopardy Clause prohibits more than one "punishment" for the same offense.[4] *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). The pending criminal trial in this case, if it results in a conviction, would, of course, subject the defendants to punishment. Thus, if the prior civil forfeiture proceeding, which was predicated on the same drug trafficking offenses as charged in the indictment, constituted a "punishment," the Double Jeopardy Clause will bar the pending criminal trial.[5]

The Supreme Court has classified a civil sanction for wrongful conduct as a "punishment" under the Double Jeopardy Clause when the sanction served a traditional goal of punishment, that is, deterrence or retribution, instead of the remedial goal of reimbursing the government and society for the costs that result from that wrongful conduct. *United States v. Halper*, 490 U.S. 435,

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[4] U.S. Const. amend [sic] V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ").

[5] Regardless of the order of the civil and criminal proceedings, the Double Jeopardy Clause will bar the second sanction if both the first and second sanctions are deemed punishment. *United States v. Sanchez-Escareno*, 950 F.2d 193, 200 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 113 S.Ct. 123, 121 L.Ed.2d 78 (1992).

448-49, 109 S.Ct. 1892, 1902, 104 L.Ed.2d 487 (1989). In *Halper,* the Supreme Court established the analytical methodology that will guide our determination of whether the civil forfeiture of the proceeds from illegal drug sales in this case served a punitive purpose, or a wholly remedial purpose. As explained below, this methodology focuses on the relationship between the amount of the civil sanction and the amount required to serve the remedial purpose of reimbursing the costs incurred by the government and society as a result of the wrongful conduct. We should make clear, however, that the sanction in *Halper* did not involve the proceeds from the crimes charged and the fact that the property forfeited in today's case constitutes unlawful proceeds is crucial to our analysis.

In *Halper,* 490 U.S. at 437-39, 109 S.Ct. at 1896-97, the government secured the conviction of a defendant on sixty-five counts of violating the False Claims Act by submitting fraudulent medicare claims. His crimes, however, had only netted him $585 in excess payments from the government, and the district court estimated the government's costs at $16,000. Nevertheless, the government, in a separate civil action, sought to impose an additional penalty of $130,000. Halper argued that the civil penalty constituted a second punishment on him for the same wrongful acts for which he had been criminally convicted and thus violated the Double Jeopardy Clause. *Id.* at 440, 109 S.Ct. at 1897. The Supreme Court reasoned that a government-imposed sanction, whether labelled as "criminal" or "civil," constituted punishment under the Double Jeopardy Clause if – and only if – the sanction, "*as applied in the individual case* serve[d] the goals of

punishment," that is, retribution and deterrence, instead of only the traditional remedial purpose of reimbursing the government for the costs incurred because of the defendant's wrongful conduct. *Id.* at 448, 109 S.Ct. at 1899-1902 (emphasis added). The Court declined to determine whether a sanction is punitive by focusing on whether a defendant subjectively feels the "sting of punishment." *Id.* at 447, 109 S.Ct. 1901 n.7. Instead, the *Halper* Court examined the civil sanction in that case with a focus on whether it was so excessive that it was punitive. *See id.*, 490 U.S. at 447, 109 S.Ct. 1902. The Court stated that a civil sanction constitutes criminal punishment only in the "rare case" in which the amount of the sanction is "overwhelmingly disproportionate" to the damages caused by the wrongful conduct and thus "bears no rational relation to the goal of compensating the government for its loss, but rather appears to qualify as 'punishment' within the plain meaning of the word." *Id.* at 449, 109 S.Ct. at 1902 (emphasis added). The Court then remanded to the district court for a determination of the government's actual costs and an application of its rational relation test. *Id.* at 452, 109 S.Ct. at 1904.

In *United States v. Ward*, 448 U.S. 242, 254, 100 S.Ct. 2636, 2644, 65 L.Ed.2d 742 (1980), the Supreme Court made clear that the compensation of both the government *and society* are remedial goals that a civil sanction may serve. The Court stated that a sanction that bore "absolutely no correlation to any damages sustained by society or the cost of enforcing the law" would be criminal. *Id.*

Thus, under *Halper*, we must classify the civil forfeiture of the unlawful proceeds of illegal drug sales under § 881(a)(6) as a punishment under the Double Jeopardy

Clause if, in this particular case, the amount of the proceeds forfeited was so great that it bore no rational relation to the costs incurred by the government and society resulting from the defendant's criminal conduct.

III

Unlike the fine imposed in *Halper,* the forfeiture of proceeds in this particular case is not so excessive as to render the relationship between the amount of the forfeiture and the resulting costs to the government and society irrational. The forfeiture of proceeds of illegal drug sales serves the wholly remedial purposes of reimbursing the government for the costs of detection, investigation, and prosecution of drug traffickers and reimbursing society for the costs of combatting the allure of illegal drugs, caring for the victims of the criminal trade when preventative efforts prove unsuccessful, lost productivity, etc. *See One Lot Emerald Cut Stones v. United States,* 409 U.S. 232, 237, 93 S.Ct. 489, 493, 34 L.Ed.2d 438 (1972) (stating that forfeiture of property under the customs laws serves remedial purpose by "provid[ing] a reasonable form of liquidated damages for violation of the inspection provisions [by] reimburs[ing] the Government for investigation and enforcement expenses"); *Halper,* 490 U.S. at 444, 109 S.Ct. at 1900 (stating that costs of detection and investigation are remedial in nature); *Rex Trailer Co. v. United States,* 350 U.S. 148, 153-54, 76 S.Ct. 219, 222 & n.6, 100 L.Ed. 149 (1956) (recognizing market and societal costs resulting from wrongdoing and avoidance of unjust enrichment as remedial purposes); *Ward,* 448 U.S. at 254, 100 S.Ct. at 2644 (recognizing repayment of damages to society as remedial).

Although revenue from illegal drug sales and the cost to the government and society are incapable of exact measurement, a principle recognized in *Halper*, 490 U.S. at 449, 109 S.Ct. at 1902, the amount of illicit drug proceeds confiscated in this case do not appear to be excessive in comparison to the resulting governmental and societal costs. Various sources estimate that illegal drug sales produce approximately $80 to $100 billion per year while exacting $60 to $120 billion per year in costs to the government and society. *See, e.g.*, Martin Wolf, *Thinking About Drug Legislation*, THE FINANCIAL TIMES (London), Sept. 4, 1989, at I-19 (estimating drug revenues in the United States to approximate $80 billion per year); 134 CONG. REC. S15,630 (statement of Sen. Danforth) (estimating drug revenues at $100 billion per year-and the costs to the government and society of drugs to total at least $110 billion); *Drug Abuse Costs to U.S. May Be 125 Billion Dollars – Study*, Reuter Library Report, LEXIS, MAJPAP Library, Sept. 5, 1991 (estimating economic costs of drug abuse to range from $60.4 billion to $124.9 billion); *see also Rex Trailer*, 350 U.S. at 154, 76 S.Ct. at 222 (recognizing that intangible and immeasurable costs to the government are appropriate considerations in determining whether a sanction is remedial or punitive).[6] Clearly, the above overlapping estimates of proceeds and resulting costs are not "overwhelmingly disproportionate" on a

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[6] The overlap of the ranges of estimated proceeds of illegal drug sales and resulting governmental and societal costs indicates a rough proportionality in this case in contrast to the overwhelmingly disproportionate relationship between the $130,000 fine and the $16,585 approximation of governmental costs in *Halper*, 490 U.S. at 437-39, 109 S.Ct. at 1896-97.

national level and, we believe, indicate a rough proportionality between the $650,000 sanction and the resulting governmental and societal costs in this case. Thus, if the drug dealers forfeited all the proceeds of their drug sales, the relationship between the amount of the proceeds and the resulting governmental and societal costs would not exhibit the excessive quality found *Halper* and would not be irrational for that reason.

Further, in this case, the defendants only forfeited a portion of the total proceeds that their large-scale drug operation produced over several years, i.e., the proceeds on hand at the time of seizure. The amount of the forfeiture bears a direct relation to the specific drug sales that generated those proceeds, but fails to compensate fully for the wrongs done from all the drug sales. Thus, instead of roughly approximating the resulting governmental and societal costs, the instant forfeiture failed to compensate fully for the wrongs done.

The Supreme Court's recent opinion in *Austin v. United States*, ___ U.S. ___, 113 S.Ct. 2801, 122 L.Ed.2d 347 (1993), does not affect our holding today. *Austin*, ___ U.S. at ___, 113 S.Ct. at 2803, dealt with whether forfeitures under §§ 881(a)(4) – conveyances, or means of transporting drugs such as automobiles – and (a)(7) – real estate used in drug transactions – constituted punishment under the Excessive Fines Clause. In distinguishing the civil forfeiture in *One Lot Emerald Cut Stones*, 409 U.S. at 237, 93 S.Ct. at 493 – a double jeopardy case in which a forfeiture was held not to constitute punishment – the *Austin* Court, 113 S.Ct. at 2811-12, stated that the forfeitures of conveyances and real estate have no correlation to, or proportionality with, the costs incurred by the

government and society because of the large and unpredictable variances in the values of real estate and conveyances in comparison to the harm inflicted upon government and society by the criminal act. Unlike the real estate forfeiture statute that can result in the confiscation of the most modest mobile home or the stateliest mansion, the forfeiture of drug proceeds will always be directly proportional [sic] amount of drugs sold. The more drugs sold, the more proceeds that will be forfeited. As we have held, these proceeds are roughly proportional to the harm inflicted upon government and society by the drug sale. Thus, the logic of *Austin* is inapplicable to § 881(a)(6) – the forfeiture of drug proceeds.

IV

Even absent the rational relation test of *Halper,* we would nevertheless be required to hold that the forfeiture of the proceeds from illegal drug sales does not constitute punishment because of the implicit and underlying premise of the rational relation test: The nature of the forfeiture proceeding may constitute punishment because it involves the extraction of lawfully derived property from the forfeiting party. Indeed, under the common law, "property was a right derived from society which one lost [through forfeiture] by violating society's laws." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *299, 4 *id.* at *382.

When, however, the property taken by the government was not derived from lawful activities, the forfeiting party loses nothing to which the law ever entitled him. Unlike the $130,000 fine in *Halper,* 490 U.S. at 438,

109 S.Ct. at 1896, the forfeiture of approximately $650,000 of illegal proceeds does not punish the defendant because it exacts no price in liberty or lawfully derived property from him. The possessor of proceeds from illegal drug sales never invested honest labor or other lawfully derived property to obtain the subsequently forfeited proceeds. Consequently, he has no reasonable expectation that the law will protect, condone, or even allow, his continued possession of such proceeds because they have their very genesis in illegal activity. *See generally, Lucas v. South Carolina Coastal Council*, ___ U.S. ___, ___, 112 S.Ct. 2886, 2894, 120 L.Ed.2d 798 (1992); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978). In short, the wrongdoer has nothing, at least nothing to which the law entitles him, to lose from the possible confiscation of the proceeds from his criminal trade. Thus, we believe the forfeiture of proceeds from illegal drug sales is more closely akin to the seizure of the proceeds from the robbery of a federal bank than the seizure of lawfully derived real property. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 671, 626, 109 S.Ct. 2646, 2652-53, 105 L.Ed.2d 528 (1989) (stating that "the government does not violate the Sixth Amendment if it seizes . . . robbery proceeds, and refuses to permit the defendant to use them to pay for his defense . . . " because, "[t]he money, though in [the defendant's] possession, is not rightfully his"); *see also Rex Trailer*, 350 U.S. at 153, 76 S.Ct. at 222 n.6 (stating that civil sanction may serve to avoid unjust enrichment). Consequently, instead of punishing the forfeiting party, the forfeiture of illegal proceeds, much like the confiscation of stolen money from a bank robber, merely places

that party in the lawfully protected financial status quo that he enjoyed prior to launching his illegal scheme. This is not punishment "within the plain meaning of the word." *Halper,* 490 U.S. at 449, 109 S.Ct. at 1902.

V

Accordingly, we AFFIRM the district court's denial of the defendants' motion to dismiss because the Double Jeopardy Clause does not bar the criminal prosecution of the defendants.

AFFIRMED.

UNITED STATES COURT OF APPEALS

Fifth Circuit

DENIALS OF REHEARING EN BANC

(Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 35)

Group 1–Denials where no member of the panel nor Judge in regular active service on the Court requested that the Court be polled on rehearing en banc.

Group 2–Denials after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Group 3–Denials on the Court's own motion after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Title	Docket Number	Date of Denial	Citation of Panel Decision
GROUP 1			
L & A Contracting Co. v. Southern Concrete Services, Inc.....	93-7171	5/2/1994	S.D.Miss., 17 F.3d 106
U.S. v. Tilley.....	93-1394	5/11/94	N.D.Tex., 18 F.3d 295

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA, Plaintiff, VS. TOMMY ROSS ANDERSON (01), SARAH JANE ANDERSON (02), JERRY WAYNE TILLEY (03), and SUSAN WELLS TILLEY (04), Defendants.	)	CRIMINAL ACTION NO. 3-92-CR-417-G

MEMORANDUM ORDER

(Filed April 29, 1993)

Before the court are the motions of all defendants to dismiss the charges against them in this case for violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution. For the reasons stated below, the motions are denied.

I. BACKGROUND

Defendants are accused of operating a marijuana distribution organization in the Dallas, Texas area that allegedly sold and delivered several thousand kilograms of marijuana throughout the United States from the summer of 1986 until mid-1991. The government contends that defendants earned millions of dollars as a result of

these sales. The government also maintains that the defendants' real property, both business and residential, was integrally involved in the distribution operation. Specifically, it is alleged that the marijuana was repackaged and weighed before shipment at one of the defendants' properties and that it was usually picked up for delivery from one of their residences.

The defendants allegedly accumulated, as a result of this operation, large amounts of wealth, evidenced by their ownership of numerous race cars and other expensive cars, luxury homes, and certificates of deposit. Although they displayed these outward signs of wealth, only small amounts of taxable income were reported to the Internal Revenue Service during the relevant years.

On July 25, 1991, the government filed a complaint for forfeiture *in rem* pursuant to 21 U.S.C. § 881(a)(6) and (a)(7). The complaint alleged that various items of real and personal property were subject to forfeiture because they were utilized in drug trafficking, were proceeds from the sale of illegal drugs, or were traceable to such proceeds. The complaint also alleged that the real property was used to facilitate the storage and distribution of illegal drugs.

On February 5, 1993, the defendants entered into a stipulated judgment for forfeiture of the subject properties, in which they as claimants agreed, among other things, that the government had probable cause to seize and institute forfeiture proceedings against the defendants' properties. On February 8, 1993, Chief Judge Barefoot Sanders of this court entered a final judgment of forfeiture under which the government took possession

of the proceeds from numerous certificates of deposit and checking accounts as well as numerous other articles of personal property, including automobiles, jewelry, miscellaneous electronic equipment, and other personal property.

On April 7, 1993, the defendants filed the instant motions, claiming that a criminal prosecution, after the forfeiture proceeding described above, subjects them to double jeopardy. They argue that the forfeiture suit, although civil in form, is punitive in nature because it serves the aims of deterrence and retribution and because it punishes them for the same acts as those underlying this prosecution. The defendants further contend that because 21 U.S.C. § 881(a)(6) was designed to penalize defendants for criminal behavior, the government elected that remedy before this prosecution was initiated and is now precluded from pursuing it by the Fifth Amendment's guarantee against double jeopardy.

II. ANALYSIS

The defendants base their argument on *United States v. Halper*, 490 U.S. 435 (1989), which held that a defendant who had been convicted of medicare fraud after a criminal trial could not, consistent with the Fifth Amendment's protection against double jeopardy, also be subject to punitive civil fines under the False Claims Act unless those fines were compensatory or remedial. Contending that a punitive civil proceeding followed by a criminal prosecution can be just as violative of double jeopardy as

the reverse situation in *Halper*,[1] the defendants submit that they have already been severely punished by the loss of property worth $500,000 in the related forfeiture proceeding. The government responds that *Halper* does not apply to forfeiture proceedings.

The court agrees with the government's position and with the holding of the Ninth Circuit in *United States v. McCaslin*, 959 F.2d 786, 788 (9th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 382 (1992):

> *Halper* has no application to the very ancient practice by which instrumentalities of a crime may be declared forfeit to the government. The forfeiture of such instrumentalities is "independent of, and wholly unaffected by any criminal proceeding *in personam*."

(*quoting Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 684 (1974) (citations omitted)). *Accord, United States v. Mendoza*, 473 F.2d 692, 694 (5th Cir. 1972) (forfeiture of convicted marijuana traffickers' automobiles not "the equivalent of criminal prosecutions for double jeopardy purposes").

It is impossible, in this court's view, to square the language of *Halper* with the defendants' contentions. *Halper* said:

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[1] *See United States v. Sanchez-Escareno*, 950 F.2d 193, 200 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 113 S.Ct. 123 (1992) ("the order of proceedings matters not to the analysis; the *Halper* principle that a civil penalty can be factored into the double jeopardy matrix should apply whether the civil penalty precedes or follows the criminal proceeding").

> What we announce now is a rule for the *rare* case . . . where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused.

490 U.S. at 449 (emphasis added). The defendants maintain that the government cannot prosecute them in this case because it elected to file a civil forfeiture proceeding before bringing this criminal prosecution. That argument, however, proves too much. When property is subject to forfeiture for violation of the law, illegal use of the property immediately vests title to the property in the government, irrespective of the existence of legal proceedings.[2] *See, e.g., United States v. § 41,305 in Currency,* 802 F.2d 1339, 1346 (11th Cir. 1986); *United States v. One Piece of Real Estate, Etc.,* 571 F.Supp. 723, 725 (W.D. Tex. 1983). "[T]he forfeiture constitutes a statutory transfer of the right [to the property] to the United States at the time the offense is committed." *United States v. Stowell,* 133 U.S. 1, 17 (1890). *Accord, Caplin & Drysdale, Chartered v. United States,* ___ U.S. ___, 109 S.Ct. 2646, 2653 (1989). *See also* 21 U.S.C. § 881(h) ("[a]ll right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section"). The only significance of a formal judicial decree of forfeiture is to confirm the forfeiture that has already taken place. *Stowell,* 133 U.S. at 16-17; *One Piece of Real Estate, Etc.,* 571 F.Supp. at 725.

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[2] Defendants stipulated in the related forfeiture proceedings here that, as to the property forfeited, the government had probable cause to seize and to institute forfeiture proceedings.

If the defendants' position were correct, large scale drug traffickers whose property is subject to forfeiture under 21 U.S.C. § 881 could always escape criminal prosecution for violation of the drug laws by virtue of the forfeiture already effected by § 881(h), whether or not judicial forfeiture proceedings had been commenced.[3] Given the sizable number of prosecutions these days of offenders whose assets are subject to forfeiture, *Halper* would – under defendants' reading – be declaring a rule not for the *rare* case but for virtually every such case. It is ironic that defendants, whose forfeited properties amounted to $500,000, maintain that they can fit within a rule intended for a "small-gauge offender" *Halper*, 490 U.S. at 449, on the theory that they have been punished enough. By their logic, the larger the offender and size of the resulting forfeiture, the more compelling the claim of double jeopardy.

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[3] If the defendants are correct that the existence of a previous forfeiture proceeding prevents prosecution of a criminal case under the double jeopardy clause, then two forfeiture cases decided the same term as *Halper*, *Caplin & Drysdale, Chartered v. United States*, ___ U.S. ___, 109 S.Ct. 2646 (1989), and *United States v. Monsanto*, ___ U.S. ___, 109 S.Ct. 2657 (1989), but approximately a month later, either make no sense or were wrongly decided. Those cases upheld the deprivation before trial of assets belonging to persons accused of drug trafficking which, but for the deprivation, they would have used to pay counsel of their choice for defense of the criminal prosecution. By defendants' reasoning, no such prosecution would have been possible since the defendants had already been deprived of their property.

III. CONCLUSION

For the reasons stated, the court concludes that the double jeopardy clause of the Fifth Amendment is inapplicable to the present case. The defendants' motions to dismiss are accordingly **DENIED.**

SO ORDERED.

April 29, 1993.

/s/ A. Joe Fish
A. JOE FISH
United States District Judge

IN THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE UNITED STATES OF AMERICA,	*	CIVIL ACTION NO.
Plaintiff,	*	3:9 CV 1486-H
V.	*	
PROPERTY, ALL APPURTENANCES, AND IMPROVEMENTS LOCATED AT 5743 RANCHERO LANE, DALLAS, DALLAS COUNTY, TEXAS, [et al.]	*	
Defendants,	*	
In Rem.	*	

COMPLAINT FOR FORFEITURE

COMES NOW the United States of America, by and through the United States Attorney for the Northern District of Texas, and for its complaint *in Rem* against defendants, to wit;

> Property, All Appurtenances, and Improvements Located at 5743 Ranchero Lane, Dallas, Dallas County, Texas,
>
> Properties Located at 2215 and 2219 Cartwright Street, Dallas, Dallas County, Texas,
>
> Note Payable to Jerry and Susan Tilley on Property, All Appurtenances, and Improvements Located at 3309 Peoria Ave., Dallas, Dallas County, Texas,

Business Assets, Accounts, and Inventory of B.B. Wells Waste Oil, Inc., Located at 5743 Ranchero Lane, Dallas, Dallas County, Texas,

Business Assets, Accounts, and Inventory of Jerry & Ludies Auto Sales, Located at 2101 E. Main St., Grand Prairie, Dallas County, Texas,

Proceeds in Certificate of Deposit Account # 15395 to Jerry Tilley or Susan Tilley or Tammy Egle, Located at Western Bank and Trust, 219 E. Camp Wisdom Rd, Duncanville, Texas,

Proceeds in Certificate of Deposit Account # 15610 to Jerry Tilley, Located at the Western Bank and Trust, 219 E. Camp Wisdom Rd., Duncanville, Texas,

Proceeds in Certificate of Deposit Account # 15198 to Jerry or Susan Tilley, Located at the Western Bank and Trust, 219 E. Camp Wisdom Rd., Duncanville, Texas,

Proceeds in Checking Account # 0001426527 to Jerry or Susan Tilley, Located at the Western Bank and Trust, 219 E. Camp Wisdom Rd., Duncanville, Texas,

Proceeds in Checking Account # 000343466 to Susan Tilley or Jerry Tilley, Located at the Western Bank and Trust, 219 E. Camp Wisdom Rd., Duncanville, Texas,

Proceeds in Checking Account # 0000040840 to B.B. Wells Waste Oil, Inc., Located at the Western Bank and Trust, 219 E. Camp Wisdom Rd., Duncanville, Texas,

Proceeds in Certificate of Deposit Account # 031-30630616-150000003 to Jerry Tilley or Susan Tilley, Located at The First City Texas Bank, 1700 Pacific, 4th Floor, Dallas, Texas,

Proceeds in Certificate of Deposit Account # 211001261-019 to Susan Tilley or Jerry Tilley, Located at the United Savings of the Southwest, 5580 LBJ Freeway, Dallas, Texas,

Proceeds in Certificate of Deposit Account # 211001270-019 to Susan Tilley, Custodian for Jerry Tilley, Jr., Minor UTUGMA, Located at The United Savings of the Southwest, 5580 LBJ Freeway, Dallas, Texas,

Proceeds in Certificate of Deposit Account # 2110011289-019 to Susan Tilley, As Custodian for David Joe Wells, Minor UTUGMA, Located at the United Savings of the Southwest, 5580 LBJ Freeway Dallas, Texas,

Proceeds in Certificate of Deposit Account # 4586112396 To Jerry Tilley or Susan Tilley or or Tammy Edmondson, Located at the NCNB Texas National Bank, 1401 Elm, Dallas, Texas,

hereinafter referred to as the "properties," in a cause of action for forfeiture for breach of the provisions of Title 21, United States Code, Section 881(a)(6) and 881(a)(7), and upon information and belief would show the Court as follows:

I.

That at all times hereinafter mentioned, the United States of America was and is a sovereign power and each of the allegations of this Complaint are within the jurisdiction of the United States of America and this Honorable Court. This Court has jurisdiction of this cause of action *in rem.* by virtue of the provisions of 28 U.S.C.,

§§ 1345, 1355, and 1395. This action is brought in conformity with the provisions of 19 U.S.C. § 1610.

II.

That on or about July 26, 1991, on land in Dallas, Texas, in Grand Prairie, Texas, and in Duncanville, Texas, in the Dallas Division of the Northern District of Texas, and within the jurisdiction of this Honorable Court, the defendant properties will be seized by the United States Marshals Service and Special Agents of the United States Drug Enforcement Administration, while in the performance of their official duties, in Dallas County, Texas, according to law.

That after the date of seizure, the defendant seized properties will remain in the actual possession of and will be continuously subject to the dominion and control of the United States Marshal for the Northern District of Texas.

The properties to be seized are listed below:

1. Property, All Appurtenances, and Improvements Located at 5743 Ranchero Lane, Dallas, Dallas County, Texas,

As to the defendant property, all appurtenances, and improvements located at 5743 Ranchero, Dallas, Dallas County, Texas, further described as:

> Being a tract of land situated in the L. TANZY SURVEY, Abstract No. 1467 and being a part of the Charles L. Bradenburg 234.6 acre tract, and being known as Tract No. 35 of the unrecorded plat of Oak Cliff Forest Addition, City Block No.

8645, City of Dallas, Texas, and being more particularly described as follows:

BEGINNING at a point in the North line of Ranchero Lane (a 60 foot Right of Way) said point being West 3577.0 feet from the intersection of the West line of Duncanville Road (a 70 foot Right of Way) with the said North line of Ranchero Lane an iron stake for corner;

THENCE West with the said North line of Ranchero Lane a distance of 160.0 feet to the Southeast corner of a tract of land conveyed to Willie R. Wilson in deed filed March 7, 1961 and recorded in Volume Records of Dallas County, Texas, an iron stake for corner;

THENCE North 0 degrees 27 minutes East a distance of 1314.0 feet to a Bolt found for corner;

THENCE South 89 degrees 39 minutes 30 seconds East a distance of 160.0 feet to an iron stake for corner;

THENCE South 0 degrees 27 minutes West with the west line of a tract of land conveyed to Wm. D. Bennett with deed filed December 4, 1967, and recorded in Deed Records of Dallas County, Texas, a distance of 1313.0 feet to the Place of Beginning and containing 4.824 acres of land.

the known possible claimants are:

Jerry Wayne Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

Susan Wells Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

2. Properties Located at 2215 and 2219 Cartwright Street, Dallas, Dallas County, Texas,

As to the properties located at 2215 and 2219 Cartwright Street, Dallas, Dallas County, Texas, further described as:

> Being Lots Forty Two (42) and Forty Three (43) in Block J/7171 of JOE A. IRWIN ADDITION NO. 7, an Addition to the City of Dallas, Texas, according to the Map thereof of record in Volume 10, Page 421, Map Records of Dallas County, Texas.

the known possible claimants are:

Jerry Wayne Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

Susan Wells Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

3. Note Payable to Jerry and Susan Tilley on Property, All Appurtenances, and Improvements Located at 3309 Peoria Ave., Dallas, Dallas County, Texas,

As to the defendant property Note Payable to Jerry and Susan Tilley on Property, All Appurtenances, and Improvements Located at 3309 Peoria Ave., Dallas, Dallas County, Texas, the known possible claimants are:

Jerry Wayne Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

Susan Wells Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

4. Business Assets, Accounts, and Inventory of
B.B. Wells Waste Oil, Inc.,
Located at 5743 Ranchero Lane, Dallas,
Dallas County, Texas,

As to the defendant property, Business Assets, Accounts, and Inventory of B.B. Wells Waste Oil, Inc., Located at 5743 Ranchero Lane, Dallas, Dallas County, Texas, the known possible claimants are:

Jerry Wayne Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

Susan Wells Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

5. Business Assets, Accounts, and Inventory of
Jerry & Ludies Auto Sales,
Located at 2101 E. Main St.,
Grand Prairie, Dallas County, Texas,

As to the defendant property, Business Assets, Accounts, and Inventory of Jerry and Ludies Auto Sales, Located at 2101 E. Main St., Grand Prairie, Dallas County, Texas, the known possible claimants are:

Jerry Wayne Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

Susan Wells Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

6. Proceeds in Certificate of Deposit Account # 15395 to Jerry Tilley or Susan Tilley or Tammy Egle, Located at Western Bank and Trust, 219 E. Camp Wisdom Rd., Duncanville, Texas,

As to the defendant property, Proceeds in Certificate of Deposit Account # 15395 to Jerry Tilley or Susan Tilley or Tammy Egle, Located at Western Bank and Trust, 219 E. Camp Wisdom Rd., Duncanville, Texas, the known possible claimants are:

Jerry Wayne Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

Susan Wells Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

Tammy Egle, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236

7. Proceeds in Certificate of Deposit Account # 15610 to Jerry Tilley, Located at the Western Bank and Trust, 219 E. Camp Wisdom Rd., Duncanville, Texas,

As to the defendant property, Proceeds in Certificate of Deposit Account # 15610 to Jerry Tilley, Located at Western Bank and Trust, 219 E. Camp Wisdom Rd., Duncanville, Texas, the known possible claimants are:

Jerry Wayne Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

Susan Wells Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

8. Proceeds in Certificate of Deposit Account # 15198
to Jerry or Susan Tilley,
located at the Western Bank and Trust,
219 E. Camp Wisdom Rd., Duncanville, Texas,

As to the defendant property, Proceeds in Certificate of Deposit Account # 15198 to Jerry or Susan Tilley, Located at Western Bank and Trust, 219 E. Camp Wisdom Rd., Duncanville, Texas, the known possible claimants are:

Jerry Wayne Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

Susan Wells Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

9. Proceeds in Checking Account # 0001426527
to Jerry or Susan Tilley,
Located at the Western Bank and Trust,
219 E. Camp Wisdom Rd., Duncanville, Texas,

As to the defendant property, Proceeds in Checking Account # 0001426527 to Jerry or Susan Tilley, Located at Western Bank and Trust, 219 E. Camp Wisdom Rd., Duncanville, Texas, the known possible claimants are:

Jerry Wayne Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

Susan Wells Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

10. Proceeds in Checking Account # 000343466
to Susan Tilley or Jerry Tilley,
Located at the Western Bank and Trust,
219 E. Camp Wisdom Rd., Duncanville, Texas,

As to the defendant property, Proceeds in Checking Account # 000343466 to Susan Tilley or Jerry Tilley, Located at Western Bank and Trust, 219 E. Camp Wisdom Rd., Duncanville, Texas, the known possible claimants are:

Jerry Wayne Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

Susan Wells Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

11. Proceeds in Checking Account # 0000040840
to B.B. Wells Waste Oil, Inc.,
Located at the Western Bank and Trust,
219 E. Camp Wisdom Rd., Duncanville, Texas,

As to the defendant property, Proceeds in Checking Account # 0000040840 to B.B. Wells Wast [sic] Oil, Inc., Located at Western Bank and Trust, 219 E. Camp Wisdom Rd., Duncanville, Texas, the known possible claimants are:

Jerry Wayne Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

Susan Wells Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

12. Proceeds in Certificate of Deposit
Account # 031-01-2007854-0000002
to Jerry Tilley or Susan Tilley,
Located at The First City Texas Bank,
1700 Pacific, 4th Floor, Dallas, Texas,

As to the defendant property, Proceeds in Certificate of Deposit Account # 031-30630616-150000003 to Jerry Tilley or Susan Tilley, Located at The First City Texas Bank, 1700 Pacific, 4th Floor, Dallas, Texas, the known possible claimants are:

Jerry Wayne Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

Susan Wells Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

13. Proceeds in Certificate of Deposit
Account # 211001261-019
to Susan Tilley or Jerry Tilley,
Located at the United Savings of the Southwest,
5580 LBJ Freeway, Dallas, Texas,

As to the defendant property, Proceeds in Certificate of Deposit Account # 211001261-019 to Susan Tilley or Jerry Tilley, Located at The United Savings of the Southwest 5580 LBJ Freeway, Dallas, Texas, the known possible claimants are:

Jerry Wayne Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

Susan Wells Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

15. Proceeds in Certificate of Deposit Account # 211001270-019 to Susan Tilley, Custodian for Jerry Tilley, Jr., Minor UTUGMA, Located at The United Savings of the Southwest, 5580 LBJ Freeway, Dallas, Texas,

As to the defendant property, Proceeds in Certificate of Deposit Account # 211001270-019 to Susan Tilley, Custodian for Jerry Tilley, Jr., Minor UTUGMA, Located at The United Savings of the Southwest 5580 LBJ Freeway, Dallas, Texas, the known possible claimants are:

Jerry Wayne Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

Susan Wells Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

Jerry Tilley Jr., whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

16. Proceeds in Certificate of Deposit Account # 2110011289-019 to Susan Tilley, As Custodian for David Joe Wells, Minor UTUGMA, Located at the United Savings of the Southwest, 5580 LBJ Freeway Dallas, Texas,

As to the defendant property, Proceeds in Certificate of Deposit Account # 2110011289-019 to Susan Tilley, As Custodian for David Joe Wells, Minor UTUGMA, Located at The United Savings of the Southwest 5580 LBJ Freeway, Dallas, Texas, the known possible claimants are:

Jerry Wayne Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

Susan Wells Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

David Joe Wells, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

17. Proceeds in Certificate of Deposit Account # 4586112396 to Jerry Tilley or Susan Tilley or Tammy Edmondson, Located at the NCNB Texas National Bank, 1401 Elm, Dallas, Texas,

As to the defendant property, Proceeds in Certificate of Deposit Account # 4586112396 to Jerry Tilley or Susan Tilley or Tammy Edmondson, Located at the NCNB Texas National Bank, 1401 Elm, Dallas, Texas, the known possible claimants are:

Jerry Wayne Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

Susan Wells Tilley, whose last known mailing address is 5743 Ranchero Lane, Dallas, Texas 75236.

properties were and are forfeited to the United States of America according to law.

V.

WHEREFORE, PREMISES CONSIDERED, the United States of America, Plaintiff, prays that:

1. Due process and a warrant for the arrest of the defendant properties issue, pursuant to Order of this Honorable Court, as provided by Title 28, United States Code, Rule C(3) and (4) of the Supplemental Rules for

Certain Admiralty and Maritime Claims, to enforce said forfeiture.

2. The defendant properties be arrested by the United States Marshal, as provided by Title 28, United States Code, Rule E(4)(b) of the Supplemental Rules for Certain Admiralty and Maritime Claims.

3. All persons having any claim on, in or to said defendant properties be admonished by appropriate public notice to timely file a verified claim in this Court and serve an answer to this Complaint for Forfeiture in the manner required by the provisions of Title 28, United States Code, Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims. Any person filing a claim and/or an answer shall serve a copy of same on Alec B. Stevenson, III, Assistant United States Attorney, 1100 Commerce Street, Room 16G28, Dallas, Texas 75242-1699.

4. That after all proceedings are had on this Complaint, said defendant properties be condemned by the judgment and order of this Honorable Court and declared and decreed to be forfeited to the United States of America according to law.

5. All costs and expenses incurred by the plaintiff in obtaining the condemnation and forfeiture of the defendant properties be appropriately taxed against any person who may claim an interest in such property and/or be jointly taxed and prorated, as the Court deems just and equitable, among any claimants of the defendant properties who may file a claim and answer herein.

6. The United States have such other and further relief, at law or in equity, to which it may show itself justly entitled.

Respectfully submitted,

MARVIN COLLINS
United States Attorney

/s/ Alec B. Stevenson, III
ALEC B. STEVENSON, III
Assistant United States Attorney
Texas State Bar No. 191907000
1100 Commerce Street, Room 16G28
Dallas, Texas 75242-1699
(214) 767-0951

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE UNITED STATES OF AMERICA, Plaintiff, v. PROPERTY, ALL APPURTENANCES, AND IMPROVEMENTS LOCATED AT 5743 RANCHERO LANE, DALLAS, DALLAS COUNTY, TEXAS [et al.] Defendants, *In Rem.*	)	CIVIL ACTION NO.: 3:91CV 1486-H (Filed Aug. 16, 1991)

RESPONDENT, JERRY TILLEY'S FIRST AMENDED ANSWER TO COMPLAINT FOR FORFEITURE AND DEMAND FOR JURY TRIAL

COMES NOW, Jerry Tilley, Respondent, and respectfully represents the following by way of answer to the Complaint for Forfeiture In Rem. Respondent answers the allegations of the complaint as follows:

1. The allegations contained in Paragraph I of the Complaint for Forfeiture In Rem are denied.

2. The allegations contained in Paragraph II of the Complaint for Forfeiture In Rem, as set out in Pages 5-14 of said Complaint are admitted, except to the extent claimant will remain in possession of certain properties in this suit and to that extent the paragraph is denied.

3. The allegations contained in Paragraph III of the Complaint for Forfeiture In Rem are denied.

4. The allegations contained in Paragraph IV of the Complaint for Forfeiture In Rem are denied.

5. The allegations contained in Paragraph V of the Complaint for Forfeiture In Rem are denied.

In addition, Respondent raises the following numbered defenses to the Government's Forfeiture In Rem:

FIRST DEFENSE

The Plaintiff in its capacity as the Executive Branch of the United States Government has failed to fulfill a condition precedent to the filing of a Forfeiture Complaint in that it has failed to seize the property prior to the filing of this forfeiture complaint, thereby deprives this Honorable Court of jurisdiction.

Moreover, Plaintiff has failed to plead the statutory jurisdiction of this Court.

SECOND DEFENSE

Plaintiff lacks probable cause for the institution of this forfeiture suit.

THIRD DEFENSE

Respondent, as custodian for David Joe Wells, a minor, asserts that said person was and is without knowledge of the allegations contained in the Government's Complaint for Forfeiture In Rem, and therefore, within

the exemption for forfeiture provided by innocent and non-negligent ownership.

FOURTH DEFENSE

Respondent, as custodian for Jerry Tilley, Jr., asserts that said person was and is without knowledge of the allegations contained in the Government's Complaint for Forfeiture In Rem, and therefore, within the exception for forfeiture provided by innocent and non-negligent ownership.

FIFTH DEFENSE

Respondent, asserts that Tammy Egle/Tammy Edmondson was and is without knowledge of the allegations contained in the Government's Complaint for Forfeiture In Rem, and therefore, within the exemption for forfeiture provided by innocent and non-negligent ownership.

SIXTH DEFENSE

Respondent is an innocent and/or non-negligent co-owner of the properties described in the Complaint, and thus, falls within the exemption from forfeiture provided by innocent and/or non-negligent ownership.

The burden of proof provided for in 19 U.S.C. Section 1615 is unconstitutional as applied to Respondent and to certain innocent owners insofar as it is unfair to expect each of them to be able to prove that Respondent's [sic] acquired their interests in the Defendant properties or any part of them from a legal non-drug source.

SEVENTH DEFENSE

The search of Respondent's Defendant In Rem properties, including, but not limited to Respondent's home located at 5743 Ranchero Lane, Dallas, Dallas County, Texas, on or about July 25, 1991, and the seizure of all Defendant Property resulting therefrom were in violation of the Fourth Amendment and/or the due process clause of the Fifth Amendment of the Constitution. All of the evidence seized and the fruits thereof should be suppressed.

EIGHTH DEFENSE

Plaintiff has failed to state a claim in the Government's Complaint for Forfeiture In Rem for failure to satisfy 28 U.S.C., Rule E(2)(a), of the Supplemental Rules For Certain Admiralty and Maritime Claims. Specifically, said rule provides that any complaint in an action in rem "shall state the circumstances from which the claim arises with such particularity that the Defendant or Claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a response of [sic] pleading". *Id.* Plaintiff has failed to state a claim in that Plaintiff's complaint fails to set out any specific facts justifying the complaint for forfeiture in rem and any warrant of arrest issuing therefrom, or judgment thereon.

NINTH DEFENSE

Plaintiff has further failed to state a claim in the Government's Complaint for Forfeiture In Rem for failure

to include therein the affidavit of Tim Gushwa, United States Drug Enforcement Administration, as alleged in Paragraph III of the Complaint For Forfeiture In Rem. The absence of any attached affidavit to any pleadings served upon Respondent causes said complaint to be insufficient as a matter of law.

TENTH DEFENSE

Incorporating by reference and realleging Defenses Nos. 7 and 8, Respondent moves for a more definite statement as permitted in Rule 12(e) of the FED.R.CIV.PRO.

ELEVENTH DEFENSE

The Government's forfeiture claim, being penal in nature, is not ripe absent allegations of criminal wrongdoing against Respondent.

Pleading in the alternative, without waiving the foregoing, should same be necessary, Respondent would further assert that in the event the Government chooses to bring criminal allegations against Respondent that Plaintiff be required to elect a remedy of civil forfeiture or criminal liability. Absent same, this proceeding works a violation of Respondent's constitutional guarantee against double jeopardy.

JURY DEMAND

Please take notice that Respondent demands trial by jury of the issues and defenses raised by his claim and answer.

WHEREFORE, PREMISES CONSIDERED, Respondent prays that this Court will:

1. Dismiss Plaintiff's Complaint For Forfeiture In Rem and Enter Judgment on behalf of Respondent;

2. Deny issuance of a certificate of probable cause, pursuant to 28 U.S.C. Section 2465, and award costs and attorneys fees to the Claimant;

3. Deny issuance of a warrant of arrest; and,

4. Provide such relief as the Court deems proper and just.

Respectfully submitted,

/s/ Robert A. Montserrat
ROBERT A. MONTSERRAT
3102 Maple Avenue, Suite 400
Dallas, Tx 75201
(214) 969-6931
Bar Card No. 14303950
Attorney for Defendant [sic]

CERTIFICATE OF SERVICE

This is to certify that a copy of the above and foregoing Respondent Jerry Tilley's First Amended Answer to Complaint for Forfeiture and Demand For Jury Trial has been furnished to The United States Attorney for the Northern District of Texas, by United States mail, postage prepaid, or by hand delivery on this 14 day of August, 1991.

/s/ Robert A. Montserrat
Robert A. Montserrat

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE UNITED STATES OF AMERICA,	)	
Plaintiff,	)	CIVIL ACTION NO.: 3:91CV 1486-H
v.	)	
PROPERTY, ALL APPURTENANCES, AND IMPROVEMENTS LOCATED AT 5743 RANCHERO LANE, DALLAS, DALLAS COUNTY, TEXAS [et al.]	)	(Filed Aug. 16, 1991)
Defendants,	)	
In Rem.	)	

RESPONDENT, SUSAN TILLEY'S FIRST AMENDED ANSWER TO COMPLAINT FOR FORFEITURE AND DEMAND FOR JURY TRIAL

COMES NOW, Susan Tilley, Respondent, and respectfully represents the following by way of answer to the Complaint for Forfeiture In Rem. Respondent answers the allegations of the complaint as follows:

1. The allegations contained in Paragraph I of the Complaint for Forfeiture In Rem are denied.

2. The allegations contained in Paragraph II of the Complaint for Forfeiture In Rem, as set out in Pages 5-14 of said Complaint are admitted, except to the extent claimant will remain in possession of certain properties in this suit and to that extent the paragraph is denied.

3. The allegations contained in Paragraph III of the Complaint for Forfeiture In Rem are denied.

4. The allegations contained in Paragraph IV of the Complaint for Forfeiture In Rem are denied.

5. The allegations contained in Paragraph V of the Complaint for Forfeiture In Rem are denied.

In addition, Respondent raises the following numbered defenses to the Government's Forfeiture In Rem:

FIRST DEFENSE

The Plaintiff in its capacity as the Executive Branch of the United States Government has failed to fulfill a condition precedent to the filing of a Forfeiture Complaint in that it has failed to seize the property prior to the filing of this forfeiture complaint, and thereby deprives this Honorable Court of jurisdiction.

Moreover, Plaintiff has failed to plead the statutory jurisdiction of this Court.

SECOND DEFENSE

Plaintiff lacks probable cause for the institution of this forfeiture suit.

THIRD DEFENSE

Respondent, as custodian for David Joe Wells, a minor, asserts that said person was and is without knowledge of the-allegations contained in the Government's Complaint for Forfeiture In Rem, and therefore, within

the exemption for forfeiture provided by innocent and non-negligent ownership.

FOURTH DEFENSE

Respondent, as custodian for Jerry Tilley, Jr., asserts that said person was and is without knowledge of the allegations contained in the Government's Complaint for Forfeiture In Rem, and therefore, within the exemption for forfeiture provided by innocent and non-negligent ownership.

FIFTH DEFENSE

Respondent, asserts that Tammy Egle/Tammy Edmondson was and is without knowledge of the allegations contained in the Government's Complaint for Forfeiture In Rem, and therefore, within the exemption for forfeiture provided by innocent and non-negligent ownership.

SIXTH DEFENSE

Respondent is an innocent and/or non-negligent co-owner of the properties described in the Complaint, and thus, falls within the exemption from forfeiture provided by innocent and/or non-negligent ownership.

The burden of proof provided for in 19 U.S.C. Section 1615 is unconstitutional as applied to Respondent and to certain innocent owners insofar as it is unfair to expect each of them to be able to prove that Respondent's [sic] acquired their interests in the Defendant properties or any part of them from a legal non-drug source.

SEVENTH DEFENSE

The search of Respondent's Defendant In Rem properties, including, but not limited to Respondent's home located at 5743 Ranchero Lane, Dallas, Dallas County, Texas, on or about July 25, 1991, and the seizure of all Defendant Property resulting therefrom were in violation of the Fourth Amendment and/or the due process clause of the Fifth Amendment of the Constitution. All of the evidence seized and the fruits thereof should be suppressed.

EIGHTH DEFENSE

Plaintiff has failed to state a claim in the Government's Complaint for Forfeiture In Rem for failure to satisfy 28 U.S.C., Rule E(2)(a), of the Supplemental Rules For Certain Admiralty and Maritime Claims. Specifically, said rule provides that any complaint in an action in rem "shall state the circumstances from which the claim arises with such particularity that the Defendant or Claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a response of [sic] pleading". *Id.* Plaintiff has failed to state a claim in that Plaintiff's complaint fails to set out any specific facts justifying the complaint for forfeiture in rem and any warrant of arrest issuing therefrom, or judgment thereon.

NINTH DEFENSE

Plaintiff has further failed to state a claim in the Government's Complaint for Forfeiture In Rem for failure

to include therein the affidavit of Tim Gushwa, United States Drug Enforcement Administration, as alleged in Paragraph III of the Complaint For Forfeiture In Rem. The absence of any attached affidavit to any pleadings served upon Respondent causes said complaint to be insufficient as a matter of law.

TENTH DEFENSE

Incorporating by reference and realleging Defenses Nos. 7 and 8, Respondent moves for a more definite statement as permitted in Rule 12(e) of the FED.R.CIV.PRO.

ELEVENTH DEFENSE

The Government's forfeiture claim, being penal in nature, is not ripe absent allegations of criminal wrongdoing against Respondent.

Pleading in the alternative, without waiving the foregoing, should same be necessary, Respondent would further assert that in the event the Government chooses to bring criminal allegations against Respondent that Plaintiff be required to elect a remedy of civil forfeiture or criminal liability. Absent same, this proceeding works a violation of Respondent's constitutional guarantee against double jeopardy.

JURY DEMAND

Please take notice that Respondent demands trial by jury of the issues and defenses raised by his claim and answer.

WHEREFORE, PREMISES CONSIDERED, Respondent prays that this Court will:

1. Dismiss Plaintiff's Complant For Forfeiture In Rem and Enter Judgment on behalf of Respondent;

2. Deny issuance of a certificate of probable cause, pursuant to 28 U.S.C. Section 2465, and award costs and attorneys fees to the Claimant;

3. Deny issuance of a warrant of arrest; and,

4. Provide such relief as the Court deems proper and just.

Respectfully submitted,

/s/ Robert A. Montserrat
ROBERT A. MONTSERRAT
3102 Maple Avenue, Suite 400
Dallas, Tx 75201
(214) 969-6931
Bar Card No. 14303950
Attorney for Defendant [sic]

CERTIFICATE OF SERVICE

This is to certify that a copy of the above and foregoing Respondent Susan Tilley's First Amended Answer to Complaint for Forfeiture and Demand For Jury Trial has been furnished to The United States Attorney for the Northern District of Texas, by United States mail, postage prepaid, or by hand delivery on this 14 day of August, 1991.

/s/ Robert A. Montserrat
Robert A. Montserrat

IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE UNITED STATES OF AMERICA, Plaintiff, V. PROPERTY, ALL APPURTENANCES, AND IMPROVEMENTS LOCATED AT 5743 RANCHERO LANE, DALLAS, DALLAS COUNTY, TEXAS, ET AL, Defendants, *In Rem.*	*	CIVIL ACTION NO. 3:91-CV-1486-H

STIPULATED FORFEITURE OF PROPERTIES
EXCLUDING PROPERTY LOCATED AT
5743 RANCHERO LANE,
DALLAS, DALLAS, COUNTY, TEXAS

Attorneys for Plaintiff and Claimants Jerry Tilley; Susan Tilley; Jerry Tilley, Jr.; Jerry and Susan Tilley, Managing Conservators for Danny Joe Wells; Tammy Egle, also known as Tammy Edmondson; and Western Bank and Trust stipulate and agree as follows:

A. Claimants Jerry Tilley; Susan Tilley; Jerry Tilley, Jr.; Jerry and Susan Tilley, Managing Conservators for Danny Joe Wells; Tammy Egle, also known as Tammy Edmondson; and Western Bank and Trust stipulate and agree that the United States, its agents, officers and employees had probable cause to seize and to institute

forfeiture proceedings against the defendant properties named in the Amended Complaint for Forfeiture, excluding the Property, All Appurtenances and Improvements Located at 5743 Ranchero Lane, Dallas, Dallas County, Texas.

The property at 5743 Ranchero Lane, Dallas, Texas, will require further litigation.

The property located at 2215 and 2219 Cartwright Street, Dallas, Dallas County, Texas, (Property No. 2 of Amended Complaint) was dismissed from this lawsuit November 19, 1991, and were released to Jerry and Susan Tilley on November 24, 1991.

A Portion of Funds Seized as Proceeds of Certificate of Deposit Account # 031-30630616-150000003 under name of Jerry Tilley or Susan Tilley at First City Texas-Dallas (Property No. 11 of the Amended Complaint) was released to First City Texas-Dallas on December 16, 1991, and the remaining $36,764.17 was received by the United States Marshal and placed into the Asset Forfeiture Holding Fund pending a decision of the Court on the forfeiture.

B. Claimants hereby release claim to:

1. (Property No. 5 of the Amended Complaint) Proceeds in Certificate of Deposit Account # 15395 to Jerry Tilley or Susan Tilley or Tammy Egle, Located at Western Bank and Trust, 219 E. Camp Wisdom Rd., Duncanville, Texas, (Balance as of 12-23-92 – $15,023.87, Principal Balance of Loan # 30812, Jerry and Susan Tilley – $4,412.95, plus Interest of $680.05 as of 12-23-92);

2. (Property No. 6 of the Amended Complaint) Proceeds in Certificate of Deposit Account # 15610 to Jerry Tilley, Located at the Western Bank and Trust, 219 E. Camp Wisdom Rd., Duncanville, Texas; (Balance as of 12-23-92 – $5,354.02 – Loan # 31465 has been paid in full);

3. (Property No. 7 of the Amended Complaint) Proceeds in Certificate of Deposit Account # 15198 to Jerry or Susan Tilley, Located at the Western Bank and Trust, 219 E. Camp Wisdom Rd., Duncanville, Texas (This CD was formerly # 13898, and is now CD # 16459, See No. 22, Property No. 29 of the Amended Complaint for amount of currency remaining to be forfeited);

4. (Property No. 8 of the Amended Complaint) Proceeds in Checking Account # 0001426527 to Jerry or Susan Tilley, Located at the Western Bank and Trust, 219 E. Camp Wisdom Rd., Duncanville, Texas;

5. (Property No. 9 of the Amended Complaint) Proceeds in Checking Account # 000343466 to Susan Tilley or Jerry Tilley, Located at the Western Bank and Trust, 219 E. Camp Wisdom Rd., Duncanville, Texas;

6. (Property No. 10 of the Amended Complaint Checking Account # 0000040840 to B.B. Wells Waste Oil, Inc., Located at the Western Bank and Trust, 219 E. Camp Wisdom Rd., Duncanville, Texas;

7. Property No. 11 of the Amended Complaint) Proceeds Certificate of Deposit Account # 031-30630616-150000003 to Jerry Tilley or Susan Tilley, Located City Texas

Bank, 1700 Pacific, 4th Floor, (Amount in Asset Forfeiture Holding Fund $36,764.17).

8. (Property No. 15 in the Amended Complaint) $19,994 of the proceeds in Certificate of Deposit Account No. 4586112396 to Jerry Tilley or Susan Tilley or Tammy Edmondson, located in the NCNB Texas National Bank, 1401 Elm, Dallas, Texas.

9. (Property No. 16 of the Amended Complaint) $233,040.00 in United States Currency, Seized at 5743 Ranchero Lane, Dallas, Texas;

10. (Property No. 17 of the Amended Complaint) Rolex Watch only of Assorted Jewelry;

11. (Property No. 18 of the Amended Complaint) Three of the Six Vehicles, Valued at $48,000.00, Seized at 5743 Ranchero Lane, Dallas, Texas, consisting:

    (a) One 1990 Chevrolet 1500 Pickup, VIN: 1GCDC14K5L178416, Valued at $8,300.00

    (b) One 1991 Chevrolet 1500 Pickup, VIN: 1GCDC14K3MZ104395, Valued at $12,415.00

    (e) One Chevrolet Nova Body Full Chassis w/Funny Car Cage, Valued at $20,000.00;

12. (Property No. 19 of the Amended Complaint) One Small Chevrolet Long Block engine w/I.P.C. Headers, # EH232; One two ton Engine Hoist; One Chevrolet Big Block Long Block w/Aluminum Heads,

Roller Cam, Tunnel Ran w. two Holly Dominator Carbs, Valued at $12,000.00, seized at 5743 Ranchero Lane, Dallas, Texas;

13. (Property No. 20 of the Amended Complaint) Two Homemade Car Hauler Trailers, Valued at $3,700.00, Seized at 5743 Ranchero Lane, Dallas, Texas;

14. (Property No. 21 of the Amended Complaint) Two of the three Bombardier Sea-Doo Jet Skis w/trailers, Valued at $1,500.00, with trailer for two Jet Skis, seized at 5743 Ranchero Lane, Dallas, Texas;

15. Property No. 22 of the Amended Complaint) One 1991 Cajun Boat w/Trailer, ID # MBVE8009J091, $14,000.00, Seized at 5743 Ranchero Lane, Dallas, Texas;

16. Property No. 23 of the Amended Complaint) Items (b) and (e) of Miscellaneous Electronic Equipment, Valued at $10,000.00, Seized at 5743 Ranchero Lane, Dallas, Texas, consisting of:

    (b) Three Cellular Phones, Valued at $3,000.00;

    (e) Two Big Screen TV's, Valued at $4,000.00;

17. (Property No. 24 of the Amended Complaint) item (b) of the Furniture, Valued at $4,000.00, Seized at 5743 Ranchero Lane, Dallas, Texas;

    (b) One Browning Pro Steel Gun Safe, valued at $1,000.00;

18. (Property No. 25 of the Amended Complaint) All Weider weights, dumbbells,

Marcy Circuit One weight machine, one punching bag, Life style rowing machine, leg weights and weight bars of Assorted Exercise Equipment, Valued at $3,500.00, Seized at 5743 Ranchero Lane, Dallas, Texas;

19. (Property No. 26 of the Amended Complaint) $130,070.00 in United States Currency, Seized from Safety Deposit Box # 3860, in the Names of Susan Tilley, Jerry Tilley, and Tammy Edmondson, Located at the Western Bank and Trust, 219 East Camp Wisdom Road, Duncanville, Texas;

20. Property No. 27 of the Amended Complaint) $7,000.00 in United States Currency, Seized from Safety Deposit Box #1363, in the Names of Susan Tilley and Tammy Egle, Located at the Western Bank and Trust, 219 East Camp Wisdom Road, Duncanville, Texas;

21. (Property No. 28 of the Amended Complaint) $10,500.00 (Current balance $1,524.31) in United States Currency, Seized as Proceeds of Certificate of Deposit Account #15814 (currently CD # 16457) to Susan Tilley, the Western Bank and Trust, 219 East Camp Wisdom Road, Duncanville, Texas; (This CD secured a note owed by Jerry and Susan Tilley to Western Bank. After the original Order of Seizure but before the first amended warrant for seizure of property Western Bank was directed by Jerry and Susan Tilley to apply the proceeds of the CD in payment of the indebtedness. $9,300.65 was applied the

Note on 11-18-91, and the balance was placed into CD 164657); and

22. (Property No. 29 of the Amended Complaint) $12,983.08 (balance as of 12-23-92 – $15,880.28 in United States Currency, Seized as Proceeds of Certificate of Deposit Account # 13898 (formerly CD # 15198 – currently CD # 16459) in the Name of Jerry Tilley, Located at the Western Bank and Trust, 219 East Camp Wisdom Road, Duncanville, Texas. (This CD secured Note #30630, owed by Billy Manson and Jerry Tilley. Principal Balance on note is $1,580.36. Mr. Manson is paying the note as agreed and will have it paid in full within a year).

of the defendant properties and agrees to entry of an order forfeiting those properties to the United States of America.

C. Plaintiff United States of America hereby declines to seek forfeiture of:

1. (Property No. 2 of the Amended Complaint) Note payable to Jerry and Susan Tilley on Property, All Appurtenances, and Improvements Located at 3309 Peoria Ave., Dallas, Dallas County, Texas;

2. (Property No. 13 of the Amended Complaint) Proceeds in Certificate of Deposit Account # 211001270-019 to Susan Tilley, Custodian for Jerry Tilley, Jr., Minor UTUGMA, Located at The United Savings of the Southwest, 5580 LBJ Freeway, Dallas, Texas;

3. (Property No. 14 of the Amended Complaint) Proceeds in Certificate of Deposit Account #2110011289-019 to Susan Tilley, As Custodian for David Joe Wells, Minor UTUGMA, Located at the United Savings of the Southwest, 5580 LBJ Freeway, Dallas, Texas;

4. Property No. 15 of the Amended Complaint) Proceeds in Certificate of Deposit Account # 4586112396 to Jerry Tilley or Susan Tilley or Tammy Edmondson, Located at the NCNB Texas National Bank, 1401 Elm, Dallas, Texas, less $19,994 in United States Currency forfeited to the United States (see item No. 8 in forfeited items;

5. Property No. 17 of the Amended Complaint) Assorted Jewelry, Valued at $16,635.00, Seized at 5743 Ranchero Lane, Dallas, Texas, with the exception of the Rolex Watch;

6. (Property No. 18 of the Complaint) Three of six Vehicles, Valued at $48,000.00, Seized at 5743 Ranchero Lane, Dallas, Texas, consisting of:

   (c) One 1984 Chevrolet Bonus Cab Dualie Pickup, VIN 1GCHC33W1ES104536, Valued at $3,000.00;

   (d) One 1967 Chevrolet Camaro Race Car, VIN # 123377L145390, Valued at $2,500.00;

   (f) One Kawasaki Motorcycle, ID # JKBLFBA15JB502996, Valued at $1,000.00;

7. (Property No. 19 of the Complaint) One Chevrolet Big Block Short Block w/Aluminum Heads and N02 Injection on 750 pounds capacity, Allied Model # ES7a Engine Stand (Serial No. 0024502T); One Chevrolet Small block Short Block Engine without carburetor and headers; One Ford 9" Center Section and Third Member Rear end of the Four Chevrolet Engines, Valued at $12,000.00, Seized at 5743 Ranchero Lane, Dallas, Texas, and any and all tools found with the engines in the garage at the time of seizure;

8. (Property No. 21 of the Complaint) One of the Three Bombardier Sea-Doo Jet Skis with trailer, Valued at $1,500.00, Seized at 5743 Ranchero Lane, Dallas, Texas;

9. (Property No. 23 of the Complaint) Items (a), (c) and (d) of the Miscellaneous Electronic Equipment, Valued at $10,000.00, Seized at 5743 Ranchero Lane, Dallas, Texas, consisting of:

   (a) One IBM PC, Model 5160 and Accessories, Valued at $1,000.00;

   (c) Three Video Cassette Recorders, Valued at $1,000.00;

   (d) One Zenith Video Camera, Mode VM 6200, ID # 60831457, Valued at $1,000.00;

10. (Property No. 24 of the Amended Complaint) Item (a) of the Furniture, Valued at $4,000.00, Seized at 5743 Ranchero Lane, Dallas, Texas, consisting of:

(a) Two Ridgeway Grandfather Clocks, Valued at $3,000.00; and

11. Property No. 25 of the Amended Complaint) Assorted Exercise Equipment, Valued at $3,500.00, Seized at 5743 Ranchero Lane, Dallas, Texas, consisting of Tanning Bed, Serial No. SW16NCSG-7, and one Life Style Tanning Salon Table, Serial No. 614299160;

12. (Property No. 12 of the Amended Complaint) Proceeds in Certificate of Deposit Account # 211001261-019 to Susan Tilley or Jerry Tilley, Located at the United Savings of the Southwest, 5580 LBJ Freeway Texas;

of the total defendant properties and agrees to entry of an order directing the United States Marshal to release the above listed properties to Claimants Jerry Tilley; Susan Tilley; Jerry Tilley, Jr.; Jerry and Susan Tilley, Managing Conservators for Danny Joe Wells; Tammy Egle, also known as Tammy Edmondson; and Western Bank and Trust.

D. "By way of further agreement, the Respondents further forfeit one 1968 Camaro and one 1989 Cadillac. For such good and valuable consideration and as part and parcel of the agreement herein in its entirety and not severable for any reason, the United States agrees to decline to seek forfeiture of one 1966 Chevy Nova II."

E. As a material inducement to the United States of America to enter into this Stipulated Forfeiture, Claimants Jerry Tilley; Susan Tilley; Jerry Tilley, Jr.; Jerry and Susan Tilley, Conservators for Danny Joe Wells; Tammy Egle, also known as Tammy Edmondson; and Western

Bank and Trust hereby irrevocably and unconditionally release, acquit and forever discharge the United States of America, the United States Marshals Service, The United States Drug Enforcement Administration, and any other federal or local law Enforcement Administration, and any federal or local law enforcement agency, and each of its officers, employees and agents, and all persons acting by, through, under, or in concert with any of them, from any and all claims, demands, causes of action or any costs, fees, or expenses which the said Jerry Tilley; Susan Tilley; Jerry Tilley, Jr.; Jerry and Susan Tilley, Managing Conservators for Danny Joe Wells; Tammy Egle, also known as Tammy Edmondson; and Western Bank and Trust may presently have, or any other claim of loss of injury, costs, fees or expenses, or for contribution or indemnification, whether presently known or unknown, arising from or in any way growing out of or resulting from or which may arise or result from the seizure, storage, possession, custody and control, and release of the above described properties by the United States Marshals Service.

F. Claimant, Western Bank, also stipulates that this settlement and resolution of this forfeiture *in rem* proceeding also disposes of any and all claims that Western Bank may or may not presently have as a result of any loan or other financial transaction, or any other claim of loss or injury, costs, fees or expenses, or for contribution or indemnification, whether presently known or unknown, arising from or in any way growing out of or resulting from or which may arise or result from the loan of money to respondents, and/or any outstanding balance thereof, origination, seizure, storage, possession, custody and control, and release of the above-described

properties including, but not limited to, CDs and loans, pursuant to this lawsuit or for any other reason against Jerry Tilley; Susan Tilley, Jerry Tilley, Jr., Jerry and Susan Tilley, Managing Conservators for Danny Joe Wells, Tammy Egle, also known as Tammy Edmondson; Respondents herein. The final disposition of this forfeiture *in rem* proceeding as stipulated herein disposes of any claim by Western Bank against any of the Respondents as hereinabove described, whether presently known or not.

G. The resolution and disposition by stipulation of this forfeiture *in rem* proceeding in no way is to be construed as an admission of criminal liability by any of the respondents hereto.

H. The parties consent to entry of an order consistent [sic] the terms set forth above and which further provides that each will bear its own costs and fees.

STIPULATED AND AGREED:

MARVIN COLLINS
United States Attorney

ALEC B. STEVENSON, III
Assistant United States Attorney
Texas State Bar No.19190700
1100 Commerce Street, Room 16G
Dallas, Texas 75242-1699
(214) 767-0951

ATTORNEY FOR PLAINTIFF

ROBERT B. MONSERRATT
Texas State Bar No.14303950
3102 Maple Avenue, Suite 400
Dallas, Texas 75201
(214) 969-6931

ATTORNEY FOR CLAIMANTS
JERRY TILLEY
SUSAN TILLEY
JERRY TILLEY, JR.
JERRY AND SUSAN TILLEY,
Managing Conservators for
Danny Joe Wells
TAMMY EGLE, A/K/A
TAMMY EDMONDSON

/s/ Jerry Tilley
JERRY TILLEY, Claimant

/s/ Susan Tilley
SUSAN TILLEY, Claimant

/s/ Jerry Tilley, Jr.
JERRY TILLEY, JR., Claimant

/s/ Susan Tilley Jerry Tilley
JERRY AND SUSAN TILLEY
Managing Conservators for
David Joe Wells

/s/ Tammy Egle
TAMMY EGLE,
A/K/A TAMMY EDMONDSON

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ATTORNEY FOR CLAIMANT
WESTERN BANK AND TRUST

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE UNITED STATES OF AMERICA, Plaintiff, V. PROPERTY, ALL APPURTENANCES, AND IMPROVEMENTS LOCATED AT 5743 RANCHERO LANE, DALLAS, DALLAS COUNTY, TEXAS, ET AL, Defendants, *In Rem.*	*	CIVIL ACTION NO. 3:91-CV-1486-H ENTERED ON DOCKET ___ PURSUANT TO F.R.C.P: RULES 58 AND 79a

FINAL JUDGMENT OF FORFEITURE EXCLUDING PROPERTY LOCATED AT 5743 RANCHERO LANE, DALLAS, DALLAS COUNTY, TEXAS

Came before this Court the parties in the above styled case yon [sic] Stipulated Forfeiture. After consideration of the stipulation this Court finds that the Plaintiff had probable cause to seize, arrest, and file forfeiture proceedings against the defendant properties which are the subject of this lawsuit, with the exception of Property, All Appurtenances, and Improvements Located at 5743 Ranchero Lane, Dallas, Dallas County, Texas.

Further litigation will be required as to property located at 5743 Ranchero Lane, Dallas, Texas.

The property located at 2215 and 2219 Cartwright Street, Dallas, Dallas County, Texas, (Property No. 2 of Amended Complaint) was dismissed from this lawsuit November 19, 1991, and were released to Jerry and Susan Tilley on November 24, 1991.

A Portion of Funds Seized as Proceeds of Certificate of Deposit Account #031-30630616-150000003 under [sic] Name of Jerry Tilley or Susan Tilley at First City Texas-Dallas (Property No. 11 of the Amended Complaint) was released to First City, Texas-Dallas on December 16, 1991, and the remaining $36,764.17 was received by the United States Marshal and placed into the Asset Forfeiture Holding Fund pending a decision of the Court on the forfeiture.

The Court finds that the only valid claimants to the remaining properties in this lawsuit are Jerry Tilley; Susan Tilley; Jerry Tilley, Jr.; Jerry and Susan Tilley, Managing Conservators for Danny Joe Wells; Tammy Egle, also known as Tammy Edmondson; and Western Bank and Trust. All right, title, or interest in the defendant property/properties by any others is hereby extinguished and barred.

Therefore, it is ORDERED, ADJUDGED AND DECREED that

1. (Property No. 5 of the Amended Complaint) Proceeds in Certificate of Deposit Account #15395 to Jerry Tilley or Susan Tilley or Tammy Egle, Located at Western Bank and Trust, 219 E. Camp Wisdom Rd, Duncanville, Texas; (Balance as of 12-23-92 – $15,023.87, Principal Balance of Loan

#30812, Jerry and Susan Tilley – $4,412.95, plus Interest of $680.05 as of 12-23-92);

2. (Property No. 6 of the Amended Complaint) Proceeds in Certificate of Deposit Account #15610 to Jerry Tilley, Located at the Western Bank and Trust, 219 E. Camp Wisdom Rd., Duncanville, Texas; (Balance as of 12-23-92 $5,354.02 – Loan #31465 has been paid in full);

3. (Property No. 7 of the Amended Complaint) Proceeds in Certificate of Deposit Account #15198 to Jerry or Susan Tilley, Located at the Western Bank and Trust, 219 E. Camp Wisdom Rd., Duncanville, Texas (This CD was formerly #13898, and is now CD #16459, See No. 22, Property No. 29 of the Amended Complaint for amount of currency remaining to be forfeited);

4. (Property No. 8 of the Amended Complaint) Proceeds in Checking Account #0001426527 to Jerry or Susan Tilley, Located at the Western Bank and Trust, 219 E. Camp Wisdom Rd., Duncanville, Texas;

5. (Property No. 9 of the Amended Complaint) Proceeds in Checking Account #000343466 to Susan Tilley or Jerry Tilley, Located at the Western Bank and Trust, 219 E. Camp Wisdom Rd., Duncanville, Texas;

6. (Property No. 10 of the Amended Complaint) Proceeds in Checking Account #0000040840 to B.B. Wells Waste Oil, Inc., Located at the Western Bank and Trust, 219 E. Camp Wisdom Rd., Duncanville, Texas;

7. (Property No. 11 of the Amended Complaint) Proceeds in Certificate of Deposit

Account #031-30630616-150000003 to Jerry Tilley or Susan Tilley, Located at The First City Texas Bank, 1700 Pacific, 4th Floor, Dallas, Texas; (Amount in Asset Forfeiture Holding Fund $36,764.17.

8. (Property No. 15 in the Amended Complaint) $19,994 of the proceeds in Certificate of Deposit Account No. 4586112396 to Jerry Tilley or Susan Tilley or Tammy Edmondson, located in the NCNB Texas National Bank, 1401 Elm, Dallas, Texas.

9. (Property No. 16 of the Amended Complaint) $233,040.00 in United States Currency, Seized at 5743 Ranchero Lane, Dallas, Texas;

10. (Property No. 17 of the Amended Complaint) the Rolex Watch only;

11. (Property No. 18 of the Amended Complaint) Items (a), (b),and (c) of the Six Vehicles, Valued at $48,000.00, Seized at 5743 Ranchero Lane, Dallas, Texas, consisting of:

    (a) One 1990 Chevrolet 1500 Pickup, VIN 1GCDC14K5L178416, Valued at $8,300.00;

    (b) One 1991 Chevrolet 1500 Pickup, VIN 1GCDC14K3MZ104395, Valued at $12,415.00;

    (c) One Chevrolet Nova Body Full Chassis w/Funny Car Cage, Valued at $20,000.00; and

12. (Property No. 19 of the Amended Complaint) One Small Chevrolet Long Block engine w/I.P.C. Headers, #EH232; One two

ton Engine Hoist; One Chevrolet Big Block Long Block w/Aluminum Heads, Roller Cam, Tunnel Ran w. two Holly Dominator Cars, Valued at $12,000.00, Seized at 5743 Ranchero Lane, Dallas, Texas;

13. (Property No. 20 of the Amended Complaint) Two Homemade Car Hauler Trailers, Valued at $3,700.00, Seized at 5743 Ranchero Lane, Dallas, Texas;

14. (Property No. 21 of the Amended Complaint) Two of the Three Bombardier Sea-Doo Jet Skis w/trailers, Valued at $1,500.00, Seized at 5743 Ranchero Lane, Dallas, Texas;

15. (Property No. 22 of the Amended Complaint) One 1991 Cajun Boat w/Trailer, ID #MBVE8009J091, Valued at $14,000.00, Seized at 5743 Ranchero Lane, Dallas, Texas;

16. (Items (b) and (e) of Property No. 23 of the Amended Complaint) Miscellaneous Electronic Equipment, Valued at $10,000.00, Seized at 5743 Ranchero Lane, Dallas, Texas, consisting of:

    (b) Three Cellular Phones, Valued at $3,000.00;

    (e) Two Big Screen TV's, Valued at $4,000.00;

17. (Property No. 24 of the Amended Complaint) One Browning Pro Steel Gun Safe, Valued at $1,000.00, of the Furniture, Valued at $4,000.00, Seized at 5743 Ranchero Lane, Dallas, Texas;

18. (Property No. 25 of the Amended Complaint) All Weider weights, dumbbells, Marcy Circuit Oneweight machine, one punching bag, Life style rowing machine, leg weights and weight bars of Assorted Exercise Equipment, Valued at $3,500.00, Seized at 5743 Ranchero Lane, Dallas, Texas;

19. (Property No. 26 of the Amended Complaint) $130,070.00 in United States Currency, Seized from Safety Deposit Box #3860, in the Names of Susan Tilley, Jerry Tilley, and Tammy Edmondson, Located at the Western Bank and Trust, 219 East Camp Wisdom Road, Duncanville, Texas;

20. (Property No. 27 of the Amended Complaint) $7,700.00 in United States Currency, Seized from Safety Deposit Box #1363, in the Names of Susan Tilley and Tammy Egle, Located at the Western Bank and Trust, 219 East Camp Wisdom Road, Duncanville, Texas;

21. (Property No. 28 of the Amended Complaint) $10,500.00 (Current balance $1,524.31) in United States Currency, Seized as Proceeds of Certificate of Deposit Account #15814 (currently CD #16457) to Susan Tilley, Located at the Western Bank and Trust, 219 East Camp Wisdom Road, Duncanville, Texas; (This CD secured a note owed by Jerry and Susan Tilley to Western Bank. After the original Order of Seizure but before the first amended warrant for seizure of property Western Bank was directed by Jerry and Susan Tilley to apply the proceeds of the CD in payment of

the indebtedness. $9,300.65 was applied to the Note on 11-18-91, and the balance was placed into CD 16457); and

22. (Property No. 29 of the Amended Complaint) $12,983.08 (balance as of 12-23-92 – $15,880.28) in United States Currency, Seized as Proceeds of Certificate of Deposit Account #13898 (formerly CD #15198 currently CD #16459) in the Name of Jerry Tilley, Located at the Western Bank and Trust, 219 East Camp Wisdom Road, Duncanville, Texas. (This CD secured Note 30630, owed by Billy Manson and Jerry Tilley. Principal Balance on note is $1,580.36. Mr. Manson is paying the note as agreed and will have it paid in full within a year).

of the defendant properties are hereby forfeited to the United States. The United States Marshal shall dispose of according to law.

It is further ORDERED, ADJUDGED AND DECREED that the United States Marshal shall release:

1. (Property No. 2 of the Amended Complaint) Note Payable to Jerry and Susan Tilley on Property, All Appurtenances, and Improvements Located at 3309 Peoria Ave., Dallas, Dallas County, Texas;

2. (Property No. 13 of the Amended Complaint) Proceeds in Certificate of Deposit Account #211001270-019 to Susan Tilley, Custodian for Jerry Tilley, Jr., Minor UTUGMA, Located at The United Savings of the Southwest, 5580 LBJ Freeway, Dallas, Texas;

3. (Property No. 14 of the Amended Complaint) Proceeds in Certificate of Deposit Account #2110011289-019 to Susan Tilley, As Custodian for David Joe Wells, Minor UTUGMA, Located at the United Savings of the Southwest, 5580 LBJ Freeway Dallas, Texas;

4. (Property No. 15 of the Amended Complaint) Proceeds in Certificate of Deposit Account #4586112396 To Jerry Tilley or Susan Tilley or Tammy Edmondson, Located at the NCNB Texas National Bank, 1401 Elm, Dallas, Texas, less $19,994 in United States Currency which is forfeited to the United States. (See item No. 8 of forfeited items);

5. (Property No. 17 of the Amended Complaint) Assorted Jewelry, Valued at $16,635.00, Seized at 5743 Ranchero Lane, Dallas, Texas, with the exception of the Rolex Watch;

6. (Property No. 18 of the Amended Complaint) Three of Six Vehicles, Valued at $48,000.00, Seized at 5743 Ranchero Lane, Dallas, Texas, consisting of:

   (c) One 1984 Chevrolet Bonus Cab Dualie Pickup, VIN 1GCHC33W1ES104536, Valued at $3,000.00;

   (d) One 1967 Chevrolet Camaro Race Car, VIN 123377L145390, Valued at $2,500.00;

   (f) One Kawasaki Motorcycle, ID #JKBLFBA15JB502996, Valued at $1,000.00;

7. (Property No. 19 of the Complaint) One Chevrolet Big Block Short Block w/Aluminum Heads and N02 Injection on 750 pounds capacity, Allied Model #ES7a Engine Stand (Serial No. 0024502T); One Chevrolet Small block Short block Engine without carburetors and headers; One Ford 9" Center Section and Third Member Rear End of the Four Chevrolet Engines, Valued at $12,000.00, Seized at 5743 Ranchero, Dallas, Texas, and any and all tools found with the engines in the garage at the time of seizure;

8. (Property No. 21 of the Amended Complaint) One of the Three Bombardier Sea-Doo Jet Skis w/trailer, Valued at $1,500.00, Seized at 5743 Ranchero Lane, Dallas, Texas;

9. (Property No, 23 of the Amended Complaint) Items (a) and (d) of the Miscellaneous Electronic Equipment, Valued at $10,000.00, Seized at 5743 Ranchero Lane, Dallas, Texas, consisting of:

   (a) One IBM PC, Model 5160 and Accessories, Valued at $1,000.00,

   (c) Three Cassette Recorders, Valued at $1,000.00;

   (d) One Zenith Video Camera, Model VM 6200, ID #60831457, Valued at $1,000.00;

10. (Property No. 24 of the Amended Complaint) Item (a) of the Furniture, Valued at $4,000.00, Seized at 5743 Ranchero Lane, Dallas, Texas, consisting of:

(a) Two Ridgeway Grandfather Clocks, Valued at $3,000.00; and

11. (Property No, 25 of the Amended C[illegible]plaint) Assorted Exercise Equipment, Valued at $3,500.00, Seized at 5743 Ranchero Lane, Dallas, Texas, consisting of Tanning Bed, Serial No. SW16NCSG-7, and one Life Style Tanning Salon Table, Serial No. 614299160,

12. (Property No, 12 of the Amended Complaint) Proceeds in Certificate of Deposit Account #211001261-019 to Susan Tilley or Jerry Tilley, Located at the United Savings of the Southwest, 5580 LBJ Freeway, Dallas, Texas;

of the defendant properties to claimants Jerry Tilley; Susan Tilley; Jerry Tilley, Jr.; Jerry and Susan Tilley, Managing Conservators for Danny Joe Wells; and Tammy Egle, also known as Tammy Edmondson; and Western Bank and Trust, through Robert B. Monserratt, attorney of record for claimants Jerry Tilley; Susan Tilley; Jerry Tilley, Jr.; Jerry and Susan Tilley, Managing Conservators for Danny Joe Wells; Tammy Egle, also known as Tammy Edmondson, as soon as is practicable.

Each party shall bear its own costs and attorneys fees.

The Clerk shall furnish a copy to each party of record.

SIGNED this 8 day of Feb. 1993.

/s/ Barefoot Sanders
BAREFOOT SANDERS, Chief
Judge UNITED STATES
DISTRICT COURT NORTHERN
DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	**CRIMINAL**
	§	**ACTION NO,**
vs.	§	
	§	**3:92-CR-417-G**
JERRY WAYNE TILLEY (01)	§	
SUSAN WELLS TILLEY (04)	§	

PLEA IN BAR
[MOTION TO DISMISS-DOUBLE JEOPARDY]
AND INCORPORATED MEMORANDUM OF LAW
(Filed Apr. 7, 1993)

TO THE HONORABLE JOE FISH, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION:

COME NOW, Defendants JERRY WAYNE TILLEY and SUSAN WELLS TILLEY, by and through their undersigned counsel, and moves [sic] this Honorable Court to bar the prosecution of and dismiss the above-styled and numbered cause, and in support thereof, would respectfully show the following:

Defendant is [sic] under indictment for a single count of conspiracy to distribute marijuana, as well as thirteen substantive counts of possession with intent to distribute, and a single count of money laundering. Defendants have previously paid substantial punitive forfeitures, in excess of $500,000.00, pursuant to 21 U.S.C. §881(a)(6) as punishment for these same offense. According to a recent decision by the United States Supreme Court, the Fifth

Amendment prohibition against double jeopardy forbids a subsequent criminal prosecution where a fine or forfeiture, either wholly or partly penal in nature, has been levied against the Defendant and paid.

The forfeiture judgment rendered against Defendant Jerry Tilley and his wife, although "civil" in form, is clearly punitive in nature, because it is in no way related to any loss suffered by the Government, nor intended to make the Government whole. Rather, it serves the twin aims of deterrence and retribution, which the Supreme Court has determined renders it a penalty, and precludes further prosecution.

FACTS

Defendants have been indicted for allegedly running a marijuana distribution operation out of a used car lot in Dallas, Texas. On July 25, 1991, the United States filed a complaint *in rem* in this District, alleging the same facts and the same general scheme of illegal activity which is alleged in this indictment. *See United States v. Property at 5743 Ranchero Lane, et al,* No. 3:91-CV-1486-H (Northern District of Texas) (complaint attached as Exhibit 1).

More than a year later, on October 8, 1992, the Government filed the indictment in this case. In January of 1993, Defendants were able to reach a settlement agreement with the Government regarding almost all of the seized property. *See Stipulated Forfeiture of Properties,* attached as Exhibit 2. The Tilleys agreed not to contest the forfeiture of over half a million dollars in cash and properties. A final judgment was entered on February 8, 1993,

assessing a punitive forfeiture of over $500,000.00. *See Final Judgment of Forfeiture,* attached as Exhibit 3.

PRIOR JUDGMENT IMPOSING PUNITIVE FORFEITURE PRECLUDES SUBSEQUENT CRIMINAL PROSECUTION

In *United States v. Halper,* 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), the Supreme Court held that imposing civil penalties upon an individual who has already been criminally convicted for the same acts amounts to double jeopardy.

> Under the Double Jeopardy Clause a Defendant who has already been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

Halper, 490 L.Ed.2d at 501.

REGARDLESS OF WHAT ITS [sic] CALLED, A JUDGMENT IS "PUNISHMENT" IF IT IS PENAL, AND NOT DESIGNED TO COMPENSATE THE GOVERNMENT

The Supreme Court went on to state that a judgment, though labelled "civil," is nevertheless punishment for purposes of the double jeopardy clause, if it is penal in nature, rather than a remedy calculated to compensate the Government for actual losses.

> The rule is one of reason: where a Defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of

> compensating the Government for its loss but rather appears to qualify as "punishment" in the plain meaning of the word, then the Defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.

Halper, 109 S.Ct. at 1902.[1]

The Court took a common sense view of what constitutes "punishment":

> Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goal of punishment. . . . From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term . . . . We therefore hold that under the Double Jeopardy Clause a Defendant who has already been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not be fairly characterized as remedial, but only as a deterrent or retribution.

Halper, 104 L.Ed.2d at 501.

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[1] Though *Halper* forbids a punishment in the form of a civil sanction which *follows* a criminal prosecution, the Fifth Circuit has held that "the order of proceedings matters not to the analysis; the *Halper* principle that a civil penalty can be factored into the double jeopardy matrix should apply whether the civil penalty precedes or follows the criminal proceeding." *United States v. Sanchez-Escareno,* 950 F.2d 193 (5th Cir. 1991).

FORFEITURE CANNOT SERIOUSLY BE CONSIDERED ANYTHING OTHER THAN AN ECONOMIC PENALTY FOR DRUG TRAFFICKING

United States v. Wood, (5th Cir. 1989.)

As Fifth Circuit Judge Edith Jones pointed out in her majority opinion in *United States v. Wood:*

> The distinction between the "civil" or "criminal" character of forfeiture is irrelevant here. Forfeiture cannot seriously be considered anything other than an economic penalty for drug trafficking.

United States v. Wood, 863 F.2d 417, 521 (5th Cir. 1989).

That is certainly the case here. The Government does not allege, nor can it seriously contend, that the activities of Defendants have somehow cost the Government over half a million dollars, and that therefore the forfeiture of that amount was somehow required to make the Government whole.

THE LEGISLATIVE HISTORY OF 881(a)(6) REFLECTS A PENAL INTENT

Even Congress concedes, in the legislative history of 21 U.S.C. §881(a)(6), the very statute giving rise to the forfeiture of the Tilleys' property, that the provision is penal in nature, and should therefore only be applied against those deserving of punishment.

> Due to the *penal nature of forfeiture statutes,* it is the intent of these provisions that property would be forfeited only if there is a substantial

> connection between the property and the underlying *criminal activity which the statute seeks to prevent.*

Joint Explanatory Statement of Titles II and III, 124 Congressional Record S 17647 (Oct. 7, 1978), 1978 USCCAN 9518, 9522 (attached as Exhibit 4) (emphasis added).

Congress thus made it abundantly clear that it was aware that 881(a)(6) was penal in nature, not only by naming it as such, but also by stating that the statute was intended to "prevent" or deter certain types of conduct, a classic punitive purpose. See *United States v. Halper,* 104 L.Ed.2d at 502 (retribution and deterrence are the "traditional aims of punishment").

THE FIFTH CIRCUIT ASSUMES THAT *HALPER* APPLIES TO CIVIL FORFEITURE

Further, in *United States v. Park,* 947 F.2d 130 (5th Cir. 1991), the Fifth Circuit made clear that it would have no trouble applying the analysis of *Halper* even to an administrative forfeiture case. In *Park,* the Government had seized $48,000.00 in undeclared currency from the defendant, and subsequently indicted him for failure to declare currency, under 31 U.S.C. §§5316, 5322, and 18 U.S.C. §1001. However, at the time of the criminal trial, the Government had not yet initiated administrative forfeiture of the money, because Park had requested that the Government refrain from proceeding with the forfeiture action until the conclusion of the criminal case.

The Fifth Circuit assumed that *Halper* analysis would apply, but determined that there had been no double

jeopardy, because there had been no forfeiture proceedings or judgment.

> In short, there was no civil forfeiture and hence no penalty for *Halper* purposes. Park could have requested that Customs commence immediate civil forfeiture proceedings at any time, but he did not. Because no final administrative action or other adjudication of civil liability occurred prior to Park's criminal conviction, either with respect to the seized currency or the assessed penalty, Park was not twice put into jeopardy.

Park, 947 F.2d at 135.

Conversely, in this case there *has* been final adjudication of civil liability before Defendants [sic] criminal trial. Thus, Defendants are being twice put into jeopardy, in violation of the Double Jeopardy Clause of the Fifth Amendment.[2]

Again, in *United States v. Sanchez-Escareno*, 950 F.2d 193 (5th Cir. 1991), the Fifth Circuit held that *Halper* analysis is to be applied to a case involving civil fines for the smuggling of marijuana, but further held that *Halper* did not preclude a prosecution in that case, because there had been no previous jeopardy. Sanchez had been arrested at the Mexican border attempting to smuggle in

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[2] To even put Defendant Tilley to trial would be a violation of her privilege against double jeopardy, regardless of the outcome of that trial, because the Double Jeopardy Clause is intended to prevent a defendant not only from being punished twice for the same offense, but also from having to bear a second trial. *Breed v. Jones*, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975); *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).

29 pounds of marijuana. He was assessed a civil fine by Customs agents, and he agreed to pay this fine, in evidence of which he signed a promissory note for the amount of the fine. However, there was no judicial assessment of any fine, no judicial approval of the settlement – in short, there were no judicial proceedings whatsoever.

The Court applied *Halper* without a second thought. However, the Fifth Circuit determined that there had been neither jeopardy nor punishment as those terms have been interpreted by the Supreme Court. Because there had been no judicial proceedings, there had clearly been no jeopardy, which attaches when the jury is selected. Because the Defendant had paid no fine, there had been no punishment.

> We find that appellees' execution of promissory notes, in the absence of a judgment or payment by appellees, does not constitute "payment" under the Double Jeopardy Clause, neither in the ordinary nomenclature associated with the word, nor pursuant to an analysis of various cases which have addressed the multiple punishment issue.

Sanchez, 950 F.2d at 201.

By contrast, Defendant Tilleys' property has been in custody of the United States for nearly two years, and the judgment was satisfied immediately upon its execution. Thus, Defendants have been punished within the meaning of the Double Jeopardy Clause.

TEXAS DISTRICT COURT DISMISSES CASE ON *HALPER* GROUNDS

At least one District Court in the Fifth Circuit has applied *Halper* with the resulting dismissal of a criminal prosecution. Distinguishing *Sanchez-Escareno,* Judge Norman Black of the Southern District of Texas held that:

> [T]he Government's position fails because, unlike in *Sanchez,* a judgment was actually rendered in the civil action that awarded punitive damages against Defendants jointly and severally.

United States v. Beszborn, No. H-90-343-SS (S.D.Tx. 1992) (attached as Exhibit 5).

Defendants are in an even stronger position than Beszborn, because in that case the judgment, though entered and finalized, had not been satisfied. As argued above, however, the judgment against Defendants was satisfied even before it was rendered – i.e., when the property was arrested.

THE GOVERNMENT WAS ON NOTICE OF THE DOUBLE JEOPARDY IMPLICATIONS, BUT STILL CHOSE TO PROCEED

The Government was made aware of the double jeopardy implications of the civil forfeiture case as early as August 8, 1991. On that date, Defendants filed their answers to the forfeiture complaint, and asserted, among other defenses, that:

> The Government's forfeiture claim, *being penal in nature,* is not ripe absent allegations of criminal wrongdoing against Respondent . . . Respondent

> would further assert that in the event the Government chooses to bring criminal allegations against Respondent that [the Government] be required to elect a remedy of civil forfeiture or criminal liability. Absent same, this proceeding works a violation of Respondent's *constitutional guarantee against double jeopardy.*

Answer of Jerry Tilley and *Answer of Susan Tilley,* at 6 (attached as Exhibits 6 and 7 respectively) (emphasis added).

Thus, the Government was fully aware that, if it proceeded on the civil forfeiture claim, such forfeiture would work a penalty against Defendants, and preclude further prosecution of Mr. and Mrs. Tilley. Since this was brought to the Government's attention, it must be presumed that the decision to proceed with the forfeiture case was a conscious and deliberate one, the consequences of which were known to and weighed by the Government. It is therefore apparent that the Government was willing to risk foregoing the criminal prosecution, in order to speedily resolve the forfeiture case. Having made this choice, the Government must now live with it.

A "DRY RUN" FOR A CRIMINAL PROSECUTION

Just as in *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896 (2d Cir. 1992), one of the problems with this case is the fact that the forfeiture claim was brought literally years before the criminal action, though both turned on the same facts. Further, while the forfeiture action was vigorously prosecuted to its conclusion, the criminal action was allowed to wait.

> In view of that fact, we have some fears that the forfeiture action is being used here as a substitute – or perhaps as a dry run – for a criminal prosecution.

Id. at 903.

THE GOVERNMENT SHOULD HAVE BROUGHT BOTH PROCEEDINGS AT ONCE

It is not as if the Government may never seek both monetary and prison penalties against a Defendant. As the Supreme Court pointed out in *Halper* nearly half a decade ago, and well before this litigation was instituted:

> Nor does the decision prevent the Government from seeking both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding. In a single proceeding the multiple punishment issue would be limited to ensuring that the total punishment did not exceed that authorized by the legislature.

Halper, 104 L.Ed.2d at 503.

Indeed, the U.S. Attorney's Money Laundering Manual, citing that exact language from *Halper,* recommends precisely that method of dealing with this situation:

> An effort can be made to have coincidental criminal prosecutions and civil penalty enforcement actions in the same court so that the criminal sanctions and the civil penalties are imposed by the court at the same time.

U.S. Attorney's Money Laundering Manual, at 59 (attached as Exhibit 8).

This would have been ridiculously easy to do in this case, because the proceedings were already in the same District and Division. In fact, the United States ultimately *did* decide to prosecute part of the civil forfeiture action in the same proceeding as the criminal case. When the parties could not reach an agreement as to the proper disposition of the Tilleys' residence at 5743 Ranchero Lane, the Government elected to try the forfeiture of the residence together with the criminal case. *See Stipulation*, at 2; *Final Judgment of Forfeiture*, at 1.

The two Assistant United States Attorneys who handled the different aspects of the case are literally officed only feet from each other. It is not as if some unnoticed civil prosecution in a far-off forum managed to elude the attention of the U.S. Attorney. All the Government had to do was coordinate the civil case with the criminal. Having elected not to do so, it should not now be given the benefit of a second prosecution of Mr. and Mrs. Tilley.

WHEREFORE, PREMISES CONSIDERED, Defendants request that the Court take judicial notice of the documents filed and attached hereto as Exhibits, which documents have been filed as Exhibits in the United States District Court, Northern District of Texas, Dallas Division. Defendants pray that the Court take judicial notice of the legislative history of 21 U.S.C. §881(a)(6), and that the Court conduct a hearing to give Defendants an opportunity to prove the other allegations in this Plea in Bar, including but not limited to, the value of the property seized and forfeited to the Government, the custody of the property, including rent to the Government during the seizure period, and loss of interest to Defendants, and any other matters which Defendants

should be required to prove based upon the allegations contained herein.

Upon the conclusion of said hearing, Defendants pray that the Court make findings of fact and conclusions of law consistent with the facts and law as set out herein, and order that the criminal action be dismissed against Defendants. Alternatively, without waiving the foregoing, in the event that the Court holds against Defendants at the conclusion of said hearing, Defendants would aver their right to an interlocutory appeal as their constitutional right against double jeopardy, which includes the right not to be tried for a second time. Therefore, Defendants would request that the Court, upon the filing of a notice of appeal of such holding against Defendants, order an interlocutory appeal to the Fifth Circuit Court as contemplated by the case law herein.

Respectfully submitted,

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SUSAN WELLS TILLEY

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Attorney for Defendant
JERRY WAYNE TILLEY

CERTIFICATE OF SERVICE

This is to certify that a copy of the above and foregoing Plea in Bar [Motion to Dismiss-Double Jeopardy] has been delivered to the U.S. Attorney's Office, Northern District of Texas, Dallas Division, on this __ day of April, 1993.

/s/ Tim K. Banner
Tim K. Banner

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
V.	§	NO. 3:92-CR-417-G
	§	
JERRY WAYNE TILLEY (3)	§	
TOMMY ROSS ANDERSON	§	
(1) SARAH JANE ANDERSON	§	
(2) SUSAN WELLS TILLEY (4)	§	

ORDER
(Filed April 29, 1993)

Came on to be heard this 29 day of April 1993, Defendants Jerry Tilley and Susan Tilley's Motion for Stay Pending Appeal. After considering the arguments and authorities put forth by Counsel, this Court is of the opinion that this motion should be, and hereby is, GRANTED through 5 pm 4-30-93 on condition that defendants file with the clerk by that time a copy of a motion to the Court of Appeals for expedited treatment of their appeal. If such a motion is filed, the stay will continue in effect until disposition of the appeal by the Court of Appeals or further order of that court. If such a motion is not filed, the stay granted herein will expire at 5 p.m. on April 30, 1993 So Ordered.

/s/ A. Joe Fish
April 29, 1993

/s/ A. Joe Fish
A. Joe Fish
United States District Judge
Northern District of Texas

Glen D. WOOD, Karen Kraak Wood, and Karen Eslinger Wood, Plaintiffs-Appellants,

v.

UNITED STATES of America, Defendant-Appellee.

No. 88-3088.

United States Court of Appeals, Fifth Circuit.

Jan. 20, 1989.

Taxpayer sought refund of income taxes paid. The United States District Court for the Eastern District of Louisiana, Veronica D. Wicker, J., 693 F.Supp. 452, granted summary judgment for Government, and taxpayer appealed. The Court of Appeals, Edith H. Jones, Circuit Judge, held that: (1) proceeds from drug smuggling which were forfeited to Government constituted taxable income, and (2) taxpayer was not entitled to loss deduction.

Affirmed.

John Harllee, Jr., Washington, D.C., Anita M. Warner, New Orleans, La., Martha Purcell Rogers, Washington, D.C., for plaintiffs-appellants.

Paul M. Predmore, Teresa E. McLaughlin, Gary R. Allen, Chief, William S. Rose, Jr., Jonathan S. Cohen, Appellate Sec., Asst. Attys. Gen., Tax Div., U.S. Dept. of Justice, Washington, D.C., for defendant-appellee.

Appeal from the United States District Court For the Eastern District of Louisiana.

Before JOHNSON, JOLLY and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

At issue is the status as taxable income of, or the right to a loss deduction for proceeds from drug smuggling forfeited to the federal government. The district court ruled that the drug proceeds were taxable income, and that the Appellant was not entitled to a loss deduction on the forfeited property under 26 U.S.C. § 1341 or § 165 on statutory and public policy grounds. 693 F.Supp. 452. Finding no error in the district court's grant of summary judgment to the government, we affirm.

BACKGROUND

In 1978 and 1979, Appellant Glen D. Wood[1] received commissions on marijuana that he handled.[2] He earned $168,000 in commissions in 1978 and $432,000 in 1979, or a total of $600,000. The money was eventually channelled into a real estate development project at Basalt, Colorado. In 1982, Wood began cooperating with a federal investigation, and in 1983, he pled guilty to conspiracy to import marijuana and importation of marijuana. He was sentenced to serve four years in prison and to pay a $30,000 fine. Wood has paid the fine and has been released after serving his sentence.

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[1] Glen D. Wood's former and present wife [sic] are parties to this proceeding solely because they filed joint income tax returns with him for the relevant tax years.

[2] The facts were stipulated by the parties.

In 1984, Wood submitted a "Counter Letter in Lieu of Forfeiture Proceeding" admitting that his interest in the Basalt properties was directly traceable to his $600,000 in commissions from drug smuggling, and thus, that the property had been impressed at all times with a constructive trust in favor of the federal government. Under the terms of the letter, he turned over his interest in the property to the Government.

In 1985, the IRS conducted an audit of Wood's personal income tax returns. The IRS asserted deficiencies for 1978 and 1979 income tax that reflected a tax on the unreported drug proceeds. Wood consequently paid $309,551 in back taxes and $154,756 in additions to tax for fraud under 26 U.S.C. § 6653(b) as well as $271,249.53 in interest. Wood then filed administrative claims for refund with the IRS. The IRS denied the claims and Wood filed this suit for refund in the district court. The complaint sets out the amounts Wood asserts are due on some of his refund theories, but those are not at issue in this appeal.

On cross motions for summary judgment, the district court ruled that the proceeds were taxable income since Wood had exercised complete dominion and control over them in the taxable years, notwithstanding that they were later forfeited to the government. The district court denied a deduction under 26 U.S.C. § 1341 for taxes paid on income that was later determined to be subject to a superior claim of right. The district court also denied a loss deduction under 26 U.S.C. § 165 on public policy grounds. Finally, the district court ruled that an Eighth Amendment claim was barred because it was not raised in the prior IRS proceeding. Wood appeals each of these rulings.

I. DRUG PROCEEDS AS TAXABLE INCOME

We first consider whether the district court erred in including proceeds from drug smuggling as taxable income when the proceeds were forfeited to the federal government. Wood rests his claim regarding what is taxable income on an "estoppel" or "preclusion" argument. Section 61[3] of the federal tax code plainly defines gross income as "all income from whatever source derived." Wood concedes that the gains from illegal activities are just as taxable as gains from legal activities. *See James v. United States*, 366 U.S. 213, 81 S.Ct. 1052, 6 L.Ed.2d 246 (1960) (overruling *Commissioner v. Wilcox*, 327 U.S. 404, 66 S.Ct. 546, 90 L.Ed. 752 (1946)). Instead, Wood claims that prior cases are distinguishable because this is the first case where the IRS has imposed a tax on proceeds that were already forfeited to the government. The government, he asserts, is acting inconsistently when it secures title to property and then taxes that property. Wood's entire argument is summarized in his assertion that "to require such a result is fundamentally unfair." Wood asks this Court to forbid or preclude the government from acting in this way.

Yet, Wood's claim must fail, because the test for taxable income is not title. The test is actual dominion and control. In *James*, 366 U.S. at 219, 81 S.Ct. at 1055, the Supreme Court explained that a "gain 'constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic

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[3] All section cites are to 26 U.S.C., the Internal Revenue Code, unless otherwise indicated.

value from it.' " (quoting *Rutkin v. United States*, 343 U.S. 130, 137, 72 S.Ct. 571, 575, 96 L.Ed. 833 (1952)). There is no dispute that Wood exercised complete dominion and control over the proceeds from the drug smuggling. It does not matter that by operation of law all right and title vested in the government as soon as the money was earned. The government did not even know the proceeds existed until some years later.

Thus, it is not inconsistent to tax income for years in which it was of economic benefit to the taxpayer. Moreover, whether or not forfeiture proceedings have begun should not affect the determination whether particular income is taxable. Nor should the test for taxable income turn, as Wood argues, on whether a taxpayer had to forfeit the proceeds to the federal government rather than make restitution to other victims. *See James, supra* (an embezzler was required to include embezzled funds in his gross income in the year when the funds were misappropriated, notwithstanding that he might later have to make restitution to the victim). The legal test for taxable income is dominion and control, and that test in its terms excludes consideration of what happens to income after it flows from the taxpayer's hands.

There are of course statutory exemptions from taxable income. Wood admits there is no case law on point, but he requests this Court to carve out an exemption for ill-gotten proceeds that were already forfeited to the federal government and for which no taxes have yet been paid. Even if we thought such an exemption equitable, it is for Congress to carve out such exemptions, not the courts.

II. LOSS DEDUCTION UNDER 26 U.S.C. § 1341

We next consider whether the district court erred in denying a deduction for the forfeited proceeds under 26 U.S.C. § 1341.[4] The district court concluded that "[t]he case of *McKinney v. United States*, 574 F.2d 1240 (5th Cir.1978), makes it very clear that § 1341 cannot be used as authority to give plaintiff a deduction for a loss." (footnote omitted). In *McKinney*, this Court held that § 1341 could not be invoked to justify a refund where the taxpayer restored embezzled funds to his employer. The Court ruled that the initial statutory requirement that "it appeared that the taxpayer had an unrestricted right to such item" was not met.[5] *Id.* at 1248. Wood argues that *McKinney* can either be distinguished, or that it should be overruled.

---

[4] Section 1341 provides in relevant part that:

> **(a) General Rule.** – If –
>
> (1) an item was included in gross income for a prior taxable year (or years) because it appeared that the taxpayer had an unrestricted right to such item;
>
> (2) a deduction is allowable for the taxable year because it was established after the close of such prior taxable year (or years) that the taxpayer did not have an unrestricted right to such item or to a portion of such item; and
>
> (3) the amount of such deduction exceeds **$3,000** . . .

[5] The Court's position in *McKinney* finds support in Treas.Reg. § 1.1341-1(a)(2) which provides in relevant part that:

> For the purpose of this section "income included under a claim of right" means an item included in gross income because it appeared from all the facts available in the year of inclusion that the taxpayer had an unrestricted right to such item.

Wood asserts that it appeared to him that he had an unrestricted right to the drug proceeds even though they were subject to forfeiture to the federal government. Although the embezzler in *McKinney* knew that the funds did not belong to him, Wood alleges he did not know of the common law forfeiture in effect at the time of his drug activity. Thus, Wood argues that the availability of § 1341 should turn on his knowledge, or lack thereof, that he had no right to the drug proceeds.

We are reluctant to hold that a wholly subjective test of a claim of right to ill-gotten gains governs § 1341(a)(1). Speculation on the grounds for Wood's claim of right to drug trafficking money[6] is, however, unnecessary, as his § 1341 claim is foreclosed for an additional reason.

Section 1341 only applies where the taxpayer is entitled to a deduction under another provision of the tax code. *United States v. Skelly Oil Co.*, 394 U.S. 678, 683, 89 S.Ct. 1379, 1382-83, 22 L.Ed.2d 642 (1969). Even if Wood prevailed on his theory that *McKinney* is distinguishable or must be overruled, he must then furnish another statutory source for a deduction. As will be seen, he cannot do this.[7]

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[6] Even if he had a claim to the proceeds, we might question whether it is "of right" any more than was McKinney's. Wood's failure to report the income on his 1978 and 1979 tax returns surely indicates some question in his mind about its status.

[7] Allowance of the forfeited amounts as a trade or business expense is expressly barred by §§ 162(f) and 280E of the Code.

III. LOSS DEDUCTION UNDER 26 U.S.C. § 165

The district court ruled that the "forfeited money is properly classified as a loss under § 165[8]," but that "the loss must be disallowed due to the 'sharply defined national policy against the possession and sale of marijuana.' " (quoting *Tank Truck Rentals, Inc. v. Commissioner*, 356 U.S. 30, 33-34, 78 S.Ct. 507, 510, 2 L.Ed.2d 562 (1958)).

Wood takes issue with this conclusion for three interrelated reasons. First, he relies on *James v. United States*, *supra*, which commented on the deductibility to an embezzler if funds were repaid to the victim:

> We do not believe that Congress intended to treat a law-breaking taxpayer differently. Just as the honest taxpayer may deduct any amount repaid in the year in which the repayment is made, the Government points out that, "if, when, and to the extent that the victim recovers back the misappropriated funds, there is of course a reduction in the embezzler's income." (footnoted omitted)

366 U.S. at 220, 81 S.Ct. at 1056. Likewise, in *McKinney*, this court acknowledged that the embezzler was entitled to a loss deduction in the year he repaid the embezzled funds, 574 F.2d at 1241, even though the full benefit of § 1341 was not available to offset the actual taxes paid when he acquired the funds. Second, Wood suggests that if public policy is not offended by allowing a loss deduction by an embezzler, it is likewise not offended where a

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[8] Section 165(a) allows a deduction for "any loss sustained during the taxable year and not compensated for by insurance or otherwise."

drug trafficker who has forfeited his ill-gotten gains later claims a deduction. Finally, he boldly argues that permitting a deduction does not frustrate public policy against drug abuse because the forfeiture constituted a remedial civil sanction rather than a criminal penalty. We disagree with each of his arguments.

Initially, it must be observed that we are bound by a prior decision of this court, unless it conflicts with *James* or we overrule it *en banc*. In *Holt v. Commissioner*, 69 T.C. 75, *aff'd. per curiam*, 611 F.2d 1160 (5th Cir.1980), a marijuana dealer was not permitted to deduct the value of his truck, trailer and marijuana that were seized by the federal government. This court approved the reasoning that § 165 would otherwise apply, but that a loss deduction under the circumstances would frustrate a sharply defined national policy. 69 T.C. at 79-80. *See Tank Truck*, 356 U.S. at 33-34, 78 S.Ct. at 509. The only significant distinction suggested by Wood between *Holt* and the present case is that Wood has forfeited the assets acquired with drug money *and* paid income tax on the forfeited amount of income, while Holt assertedly did not pay tax on the forfeited assets. This distinction is specious. There is no suggestion in our prior opinion that Holt never paid income tax on the money with which he acquired the assets that were later forfeited. But for the interest and penalties that accrued from Wood's late payment of income tax on the 1978 and 1979 drug proceeds, Wood is in exactly the same tax position as Holt if no deduction is allowed.

Not only is *Holt* controlling, but upon reflection, *James* and *McKinney* appear irrelevant to a case predicated on a drug forfeiture. *James* asserted wholly in *dicta*

that if a victim recovered embezzled funds, the embezzler would suffer a tax loss in the year of restitution. In *McKinney*, notwithstanding a § 1341 issue decided by this court, the government did not contest the taxpayer's right to a loss deduction in the year of restitution. Neither of these cases considered the argument whether a sharply defined public policy enforced by fines or penalties would prohibit deductions for losses attributed to restitution payments. *Compare Waldman v. Commissioner*, 88 T.C. 1384 (1987), *aff'd.*, 850 F.2d 611 (9th Cir.1988). In neither case was there any discussion about the comparative tax consequences of voluntary or forced restitution by the embezzler. We decline to base a broad "public policy" ruling on the penumbras of *James* and *McKinney*, which lack any public policy discussion whatsoever.

Contrary to Wood's position, it is easy to sustain a public policy rationale for denying a loss deduction. Wood contends that because forfeiture is a civil rather than a criminal sanction, citing *United States v. D.K.G. Appaloosas, Inc.*, 829 F.2d 532 (5th Cir.1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1270, 99 L.Ed.2d 481 (1988), a deduction will not offend public policy. He adds that he has paid his criminal debt by means of imprisonment and a $30,000 fine which he did not seek to deduct. It is obvious, however, that the public policy embodied in this nation's drug laws is not enhanced by allowing a tax deduction to offset a forfeiture. The distinction between the "civil" or "criminal" character of forfeiture is irrelevant here.[9] Forfeiture cannot seriously be considered

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[9] *DKG Appaloosas, Inc., supra*, discussed only the extent to which a drug forfeiture is civil or criminal for the purposes of

anything other than an economic penalty for drug trafficking. *Holt* observed that "[t]he primary purpose of such forfeitures is to cripple illegal drug trafficking and narcotics activities by depriving narcotics peddlers of the operating tools of their trade." 69 T.C. at 80. The legislative history of 21 U.S.C. § 881 reveals that the forfeiture provision was designed to reach drug traffickers "where it hurts the most," 124 Cong.Rec. 36049 (1979), and to augment "the traditional criminal sanctions of fines and imprisonment." H.R.Rep. No. 98-1030, 98th Cong., 2d Sess. (1984), U.S.Code Cong. & Admin. News 1984, p. 3182.

The Supreme Court in *Tank Truck Rentals* enunciated a flexible test for allowance of deductions "to accommodate both the Congressional intent to tax only net income, and the presumption against Congressional intent to encourage violation of declared public policy." 356 U.S. at 35, 78 S.Ct. at 510. The Court declared:

> If the expenditure [sought to be deducted] is not itself an illegal act, but rather the payment of a penalty imposed by the State because of such an act, as in the present case, the frustration attendant upon deduction would be only slightly less remote, and would clearly fall within the line of disallowance. Deduction of fines and penalties uniformly has been held to frustrate state policy in severe and direct fashion by reducing the

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considering whether certain constitutional safeguards appropriate to criminal prosecutions would apply. Except for its bearing on Wood's Eighth Amendment claim, which we do not reach, *DKG Appaloosas* is inapposite.

> "sting" of the penalty prescribed by the state legislature.

Id. Allowing a loss deduction would certainly "take the sting" out of a penalty intended to deter drug dealing.

IV. EIGHTH AMENDMENT CLAIM

Wood's final contention is that having to pay taxes on the forfeited amounts, without receiving a loss deduction, violates the Eighth Amendment.[10] He must overcome the hurdle that he did not raise this issue in the IRS proceedings. To do so, he contends that the statute and regulations at issue are only intended to prevent a litigant from varying the factual bases of his administrative argument at trial. He states that here, the Commissioner has been apprised of the exact nature of his claim and the facts upon which it is advanced. But Wood cites cases that reflect one purpose of the statute and regulations without mentioning that the requirements of 26 U.S.C. § 7422 and Treas.Reg. § 301.6402-2(b)(1)[11] also inform the Government of the legal grounds relied on. *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272, 51 S.Ct. 376, 377, 75

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[10] The Eighth Amendment provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[11] Treas.Reg. § 301.6402-2(b)(1) provides, in pertinent part, as follows:

> No refund or credit will be allowed . . . except upon one or more of the grounds set forth in a claim [properly] filed. . . . The claim must set forth in detail each ground upon which a credit or refund is claimed and the facts sufficient to apprise the Commissioner of the exact basis thereof. . . .

L.Ed. 1025 (1931); *Alabama By-Products Corp. v. Patterson*, 258 F.2d 892, 900-01 (5th Cir.1958).

It is the settled law of the Supreme Court and this Circuit that "[a]bsent a waiver by the government, a taxpayer is barred from raising in a refund suit grounds for recovery which had not previously been set forth in its claim for a refund." *Mallette Bros. Const. Co., Inc. v. United States*, 695 F.2d 145, 155 (5th Cir. 1983) (citing numerous prior cases). In *Alabama By-Products*, this Court explained the purpose of the rule precluding the raising of new issues in the courts of law:

> All grounds upon which a taxpayer relies must be stated in the original claim for refund so as to apprise the Commissioner of what to look into; the Commissioner can take the claim at its face value and examine only those points to which his attention is necessarily directed. *United States v. Garbutt Oil Co.*, 302 U.S. 528, [533], 58 S.Ct. 320, [323], 82 L.Ed. 405 [1938]. Anything not raised at that time cannot be raised later in a suit for refund. *Carmack v. Scofield*, 201 F.2d 360, 362 [5th Cir.1953] . . .
>
> 'A taxpayer is not permitted to advance one ground for refund in his claim filed with the Commissioner and thereafter rely upon an entirely different ground in a subsequent suit for refund, *but is confined to the scope of the grounds for refund asserted in his claim filed with the Commissioner.*'

258 F.2d at 900-01 (quoting *Carmack*, 201 F.2d at 362) (emphasis in original).

We find the instructions and the reasoning of these cases dispositive. The Commissioner should have been

given the opportunity to consider whether the forfeiture law operating in tandem with the tax code constitutes a "fine". The Commissioner also should have been given the opportunity to consider whether such a "fine" was an "excessive fine" within the meaning of the Eighth Amendment. In truth, we do not know, nor could the Commissioner have assayed, the exact amount of any refund that would be due to Wood if he were to prevail on any of his refund theories. The record does not show how any disposition of this case would affect his Eighth Amendment claim. Accordingly, the district court properly refused to consider the merits of this constitutional claim.

For the foregoing reasons, we therefore AFFIRM the judgment of the district court.

§ 881. Forfeitures

(a) Subject property. The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(4) All Conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that–

> (A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party to [sic] privy to a violation of this title or title III;
>
> (B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and
>
> (C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this title, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this title, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA Plaintiff, VS. TOMMY ROSS ANDERSON, SARAH JANE ANDERSON, JERRY WAYNE TILLY [sic] and SUSAN WELLS TILLY [sic], Defendants.	)	NO. 3-92-CR-417-G April 29, 1993

HEARING ON PLEA IN BAR MOTION
Before the Honorable A. Joe Fish

(Filed May 3, 1993)

For the Plaintiff:
UNITED STATES ATTORNEY'S OFFICE
1100 Commerce Street, Rm 16G28
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BY: Mr. Stewart Robinson and
Mr. Mike Snipes

For the Defendant Tommy Anderson:
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Dallas, Texas 75201

For the Defendant Sarah Jane Anderson:
Mr. Barry Sorrels
2515 McKinney Avenue LB21
Dallas, Texas 75201

For the Defendant Jerry Tilly:
Mr. John Fahle
29th Floor, Tower Life Building
San Antonio, Texas 78205

For the Defendant Susan Tilly:
Mr. Robert Monserrat
3102 Maple, Suite 400
Dallas, Texas 75201

Reported by: Cassidi L. Casey
United States District Court Reporter
1100 Commerce Street, Rm 15D6L
Dallas, Texas 75242

* * *

[MR. MONSERRAT:]

The next item is Defendants Plea in Bar hearing Exhibit Number 5. This is the answer to the complaint for forfeiture and demand for jury trial in Jerry Tilly Junior's case. This is an answer made by one of the respondents in that answer. There were five respondents. The significant aspect of this as well as other answers that were filed today [p. 10] is the defendants in this particular Exhibit 5 the eighth defense specifically states "The government's forfeiture claim, being penal in nature, is not ripe absent allegations of criminal wrongdoing against the respondent.

"And pleading in the alternative without waiving the foregoing, should same be waived, respondent would further assert that in the event the government chooses to bring criminal allegations against the respondent that plaintiff be required to elect a remedy of civil forfeiture or criminal liability. Absent same, this proceeding works

a violation of respondent's constitutional guarantee against double jeopardy."

This was filed in the civil court on August 8, 1991, placing the United States squarely on notice that that respondent foresaw and understood the nature of these proceedings to be in fact penal in nature and putting the government on notice they should elect their remedy. Or they could choose to do as our motion indicates: they could consolidate this for the purposes of one trial in one court.

* * *

[MR. FAHLE:]

[T]here is nothing in the stipulated judgments of forfeiture, in the complaint for forfeiture or in the – I'm sorry. Stipulated Agreed Forfeiture and then the Final Agreed Forfeiture. There is nothing in any of those documents that tells us exactly why these are forfeited. There is nothing that says these are being forfeited as instrumentalities of a crime. That's one reason we requested a hearing on this motion, is because it would be interesting to learn how the government [p. 20] perceives cash and monetary instrumentalities and bank accounts to be instrumentalities of a crime. These are proceeds, your Honor, which is an entirely different proceeding from instrumentalities under (a)(6) and (a)(7) both, 881(a)(6) and 881(a)(7). Things can be forfeited as instrumentalities. The problem is it's not specific enough in the court's order to tell us whether these are forfeitures of instrumentalities or proceeds.

* * *

MR. ROBINSON: . . . By definition if they are instrumentalities they cannot be disproportionates [sic]. . . . [Mr. Fahle] says we've got to find out what happened here and the facts of what the scope of this is. You do that by trying the case I think.

* * *

[p. 50] CERTIFICATION

I, Cassidi L. Casey, certify that during the proceedings of the foregoing-styled and -numbered cause, I was the official reporter and took in stenotypy [sic] such proceedings and have transcribed the same as shown by the above and foregoing pages 1 through 50 and that said transcript is true and correct.

I further certify that the transcript fees and format comply with those prescribed by the court and the Judicial Conference of the United States.

/s/ Cassidi L. Casey
CASSIDI L. CASEY
UNITED STATES
DISTRICT REPORTER
NORTHERN DISTRICT
OF TEXAS
DALLAS DIVISION
BOARD NUMBER 1703

1978 USCC&AN 9518
1978 WL 8484 (Leg.Hist.)

P.L. 95-633, PSYCHOTROPIC SUBSTANCES ACT OF 1978
SEE PAGE 92 STAT. 3768
SENATE REPORT (JUDICIARY COMMITTEE)
NO. 95-959, JUNE 27, 1978
(TO ACCOMPANY S. 2399) HOUSE REPORT
(INTERSTATE AND FOREIGN COMMERCE
COMMITTEE) NO. 95-1193, MAY 15, 1978 (TO
ACCOMPANY H.R. 12008) CONG. RECORD VOL. 124
(1978) DATES OF CONSIDERATION AND PASSAGE
SENATE JULY 27, OCTOBER 7, 1978
HOUSE SEPTEMBER 18, OCTOBER 13, 1978

THE SENATE BILL WAS PASSED IN LIEU OF THE HOUSE BILL AFTER AMENDING ITS LANGUAGE TO CONTAIN MUCH OF THE TEXT OF THE HOUSE BILL. THE HOUSE REPORT (THIS PAGE) AND A JOINT EXPLANATORY STATEMENT (P. 9518) ARE SET OUT. . . .

JOINT EXPLANATORY STATEMENT OF
TITLES II AND III

124 CONGRESSIONAL RECORD S 17647
OCT. 7, 1978

* * *

TITLE III – FORFEITURE OF PROCEEDS OF ILLEGAL DRUG TRANSACTIONS

SECTION 301 OF THE SENATE AMENDMENT AMENDS SECTION 511 OF THE CONTROLLED SUBSTANCES ACT (21 U.S.C. 1881), WHICH CURRENTLY PROVIDES FOR THE FORFEITURE OF CERTAIN TYPES OF PROPERTY IF SUCH PROPERTY IS USED, OR

INTENDED FOR USE, IN THE MANUFACTURE OR DISTRIBUTION OF ILLEGAL DRUGS OR USED OR INTENDED TO BE USED TO FACILITATE CERTAIN VIOLATIONS OF THE ACT. THE TYPES OF PROPERTY COVERED UNDER THE CURRENT LAW INCLUDES ILLICIT ABUSABLE DRUGS, RAW MATERIALS AND EQUIPMENT USED IN MANUFACTURING SUCH DRUGS, PROPERTY USED TO CONTAIN OR CONCEAL SUCH DRUGS, VEHICLES USED TO FACILITATE THE TRANSPORTATION OF SUCH DRUGS, AND ANY RECORDS, BOOKS, OR FORMULAS USED IN VIOLATION OF FEDERAL ILLICIT DRUG LAWS. THE SENATE AMENDMENT EXPANDS SECTION 511 OF THE ACT TO PROVIDE FOR THE FORFEITURE OF THE FOLLOWING ADDITIONAL TYPES OF PROPERTY: (1) ALL MONIES, NEGOTIABLE INSTRUMENTS, SECURITIES, OR OTHER THINGS OF VALUE FURNISHED OR INTENDED TO BE FURNISHED BY ANY PERSON IN EXCHANGE FOR ILLICIT CONTROLLED SUBSTANCES, (2) ALL PROCEEDS TRACEABLE TO SUCH AN EXCHANGE FOR ILLICIT CONTROLLED SUBSTANCES, AND (3) ALL MONEYS, NEGOTIABLE INSTRUMENTS, AND SECURITIES USED OR INTENDED TO BE USED TO FACILITATE ANY CONTROLLED SUBSTANCE LAW VIOLATIONS. DUE TO THE PENAL NATURE OF FORFEITURE STATUTES, IT IS THE INTENT OF THESE PROVISIONS THAT PROPERTY WOULD BE FORFEITED ONLY IF THERE IS A SUBSTANTIAL CONNECTION BETWEEN THE PROPERTY AND THE UNDERLYING CRIMINAL ACTIVITY WHICH THE STATUTE SEEKS TO PREVENT. SPECIFICALLY, THE SENATE AMENDMENT PROVIDES FOR

THE FORFEITURE OF PROPERTY EXCHANGED OR INTENDED TO BE EXCHANGED IN AN ILLEGAL DRUG TRANSACTION. IN ADDITION IT PROVIDES FOR FORFEITURE OF PROPERTY WHICH IS THE PROCEEDS OF AN ILLEGAL DRUG TRANSACTION ONLY IF THERE IS A TRACEABLE CONNECTION [sic] SUCH PROPERTY AND THE ILLEGAL EXCHANGE OF CONTROLLED SUBSTANCES. THUS IF SUCH PROCEEDS WERE, FOR EXAMPLE, COMMINGLED WITH OTHER ASSETS, INVOLVED IN INTERVENING LEGITIMATE TRANSACTIONS, OR OTHERWISE CHANGED IN FORM: [sic] THEY WOULD STILL BE SUBJECT TO FORFEITURE, BUT ONLY TO THE EXTENT THAT IT COULD BE SHOWN THAT A TRACEABLE CONNECTION TO AN ILLEGAL TRANSACTION IN CONTROLLED SUBSTANCES EXISTED. SIMILARLY, ANY MONEYS, NEGOTIABLE INSTRUMENTS, OR SECURITIES THAT WERE USED OR INTENDED TO BE USED TO FACILITATE ANY VIOLATIONS OF THE CONTROLLED SUBSTANCES ACT WOULD BE FORFEITABLE ONLY IF THEY HAD SOME SUBSTANTIAL CONNECTION TO, OR WERE INSTRUMENTAL IN, THE COMMISSION OF THE UNDERLYING CRIMINAL ACTIVITY WHICH THE STATUTE SEEKS TO PREVENT. FINALLY IT SHOULD BE POINTED OUT THAT NO PROPERTY WOULD BE FORFEITED UNDER THE SENATE AMENDMENT TO THE EXTENT OF THE INTEREST OF ANY INNOCENT OWNER OF SUCH PROPERTY. THE TERM 'OWNER' SHOULD BE BROADLY INTERPRETED TO INCLUDE ANY PERSON WITH A RECOGNIZABLE LEGAL OR EQUITABLE INTEREST IN THE PROPERTY SEIZED.

SPECIFICALLY THE PROPERTY WOULD NOT BE SUBJECT TO FORFEITURE UNLESS THE OWNER OF SUCH PROPERTY KNEW OR CONSENTED TO THE FACT THAT: 1. THE PROPERTY WAS FURNISHED OR INTENDED TO BE FURNISHED IN EXCHANGE FOR A CONTROLLED SUBSTANCE IN VIOLATION OF LAW, 2. THE PROPERTY WAS PROCEEDS TRACEABLE TO SUCH AN ILLEGAL EXCHANGE, Or [sic] 3. THE PROPERTY WAS USED OR INTENDED TO BE USED TO FACILITATE ANY VIOLATION OF FEDERAL ILLICIT DRUG LAWS.

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-3088

GLENN D. WOOD, KAREN KRAAK WOOD and KAREN ESLINGER WOOD,
Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA,
Defendant-Appellee

ON APPEAL FROM THE JUDGMENT
OF THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA

BRIEF FOR THE APPELLEE

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* * *

Moreover, in *Calero-Toledeo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687 (1974), the Supreme Court noted that the purpose underlying a similar Puerto Rican statute requiring the forfeiture of conveyances connected with controlled substances "fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." *Although forfeiture under 21 U.S.C. Section 881(a)(6) is a civil sanction, the economic penalty it imposes is nevertheless directed at deterring and punishing criminal activity.* See H.R. 98-1030, *supra* ([1984] 2 U.S. Code Cong.

& Ad. News 3182, 3374). In short, there is no merit to the suggestion that requiring the surrender of profits gained in illegal transactions is not a "penalty" for tax purposes.

Contrary to taxpayer's contention (Br. 23), this Court's decision in *United States v. D.K.G. Appaloosas, Inc.*, 829 F. 2d 532 (5th Cir. 1987), cert. denied, 56 U.S.L.W. 3666 (Sup. Ct. Mar. 28, 1988), furnishes no basis for the contention that the deduction is allowable because the forfeiture was not a penalty for tax purposes. There, gold bars purchased before the enactment of Section 881(a)(6) were forfeited to the Government under 21 U.S.C Section 881(a)(6). Their owner contended that the forfeiture was precluded by the *ex post facto* clause, despite the fact that Section 21 U.S.C. 881(a)(6) is a civil penalty, because its effect is quasi-criminal. 829 F. 2d at 540.

* * *

In this respect, taxpayer's situation is no different than that of an embezzler or the recipient of an illegal kickback.

* * *

Respectfully submitted,

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JULY 1988

Reversed and Rendered; Majority and Dissenting Opinions filed July 21, 1994.

(SEAL)

In The

Fourteenth Court of Appeals

NO. A14-94-00013-CR

DANNY FANT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 675,838

MAJORITY OPINION

In this appeal from the trial court's denial of appellant's application for a writ of habeas corpus, we consider whether double jeopardy bars appellant's trial for possession of a controlled substance with intent to deliver, after the State has obtained a forfeiture judgment arising out of the same criminal occurrence. We conclude that it does.

Appellant was arrested and charged with possession of a controlled substance with intent to deliver in cause No. 656,133. Three days later, the State initiated forfeiture proceedings against him in the 55th District Court of Harris County in cause No. 93-05397, pursuant to TEX. CODE CRIM. PROC. ANN. Chapter 59 (Vernon Supp. 1994).

Appellant and the State entered into an agreed judgment, whereby appellant forfeited $3,823.00 in United States currency and one Motorola cellular telephone. Subsequently, appellant filed a pretrial application for a writ of habeas corpus, claiming that constitutional protections against double jeopardy barred the State from prosecuting him further for the possession offense.[1] The trial court denied the application, but stayed further proceedings pending the outcome of this appeal.

Appellant contends that his prosecution is barred by the Double Jeopardy clauses contained in the United States and Texas Constitutions. U. S. CONST. amend. V; TEX. CONST. art. I, § 14. Conceptually, the State and Federal double jeopardy provisions are identical. *Stephens v. State*, 806 S.W.2d 812, 815 (Tex. Crim. App. 1990), *cert. denied*, 112 S.Ct. 350, 116 L.Ed.2d 289 (1991); *Phillips v. State*, 787 S.W.2d 391, 393 n. 2 (Tex. Crim. App. 1990). We first address appellant's claim under the United States Constitution. The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *United States v. Halper*, 490 U.S. 435, 440 (1989). The third of these protections is the one before us today. The issue is simple: is forfeiture under Chapter 59 "punishment"?

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[1] A pretrial writ of habeas corpus is the appropriate remedy to review a claim of double jeopardy. *Stephens v. State*, 806 S.W.2d 812, 814 (Tex. Crim. App. 1990); *cert. denied*, 112 S.Ct. 350, 116 L.Ed.2d 289 (1991).

The United States Supreme Court has, in three recent cases, addressed the issue of what constitutes "punishment." The first case is *Halper, supra,* in which the Supreme Court considered whether a civil penalty may constitute a second "punishment" for the purposes of double jeopardy analysis. *Halper,* 490 U.S. at 441. The Supreme Court first found that the label "criminal" or "civil" was a distinction without a difference, because a civil as well as a criminal sanction constitutes punishment when the sanction, as applied, serves the goal of punishment. *Id.* at 448. The court stated:

> [A] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as *also* serving either retributive or deterrent purposes, is punishment, as we have come to understand the term (emphasis added).

Id. The Supreme Court went on to announce a rule that in the "rare case" where the sanction imposed is overwhelmingly disproportionate to the damage caused by the offender and bears no rational relation to the goal of compensating the Government for its loss,[2] the defendant is entitled to an accounting of the Government's damages to determine if the penalty sought following criminal prosecution constitutes a second punishment. *Id.* at 449.

Following the decision in *Halper,* the Supreme Court heard *Austin v. United States,* ___ U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993). In *Austin,* the issue was whether the Excessive Fines Clause of the Eighth Amendment

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[2] In *Halper,* the defendant filed false Medicare claims totalling $585. Under the terms of the Federal False Claims Act, he was fined over $130,000.

applied to forfeitures of property under the Federal controlled substance forfeiture statute.[3] Because the Eighth Amendment limits the government's power to punish, the Supreme Court was called on to determine whether the statutory forfeiture was "punishment." The Court summarized the history of common law forfeitures, beginning with English law, and concluded with the observation that "this Court . . . consistently has recognized that forfeiture serves, at least in part, to punish the owner." *Austin*, 113 S.Ct. at 2810. Then, utilizing the *Halper* test of whether the statute in question serves at least *in part* to punish, *Austin*, 113 S.Ct. at 2810 n. 12 (emphasis in original), the Supreme Court analyzed several factors and stated:

> [W]e cannot conclude that forfeiture under [the statute] serves solely a remedial purpose [footnote omitted]. We therefore conclude that forfeiture under these provisions constitutes "payment to a sovereign as punishment for some offense," *Browning-Ferris [Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)] and, as such is subject to the limitations of the Eighth Amendment's Excessive Fines Clause.

Id. at 2812. The Court also stated that because the value of property forfeitable under the statute can vary so dramatically, any relationship between the Government's actual costs and the amount of a forfeiture is merely coincidental, and forfeiture as a penalty has no correlation to any damages sustained by society or to the cost of enforcing

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[3] 21 U.S.C.A. § 881 (1981 & West Supp. 1994).

the law. *Id.* at 2812, and n. 14 (quoting *United States v. Ward*, 448 U.S. 242, 254 (1980)).

Finally, the Court handed down its decision in *Dept. of Revenue v. Kurth Ranch*, 62 U.S.L.W. 4429, 1994 WL 237615 (U.S. June 6, 1994), in which the issue was whether a state marijuana tax had punitive characteristics that subjected it to the constraints of the Double Jeopardy clause. Citing *Halper* and *Austin*, the Supreme Court began by noting that criminal fines, civil penalties, *civil forfeitures*, and taxes all generate government revenues, impose fiscal burdens on individuals, deter certain behaviors, and *are subject to constitutional constraints*. *Kurth Ranch*, 62 U.S.L.W. at 4432 (emphasis added). It then stated that "fines, penalties, and *forfeitures* are readily characterized as sanctions." *Id.* at 443 (emphasis added). This language clearly indicates that the Supreme Court has no question that forfeitures are punishment. The issue in *Kurth Ranch* was whether the marijuana tax's purposes were punitive in nature, *as are fines, penalties, and forfeitures*. The Court concluded that the drug tax was fairly characterized as punishment, and thus could not be imposed in a second proceeding following the first punishment for the criminal offense. *Id.* at 4434. Interestingly, the Court also announced that the application of *Halper's* method of determining whether a penalty was remedial or punitive, by evaluating whether the damages assessed were in proportion to damages suffered by the government, was inappropriate because the tax assessed had no

relation to costs to the State that are attributable to the defendant's conduct.[4]

The task before us today is to determine whether appellant has already been "punished" by the forfeiture of his property under TEX. CODE CRIM. PROC. ANN. art. 59.02 (Vernon Supp. 1994). In *Austin*, the Supreme Court analyzed a series of factors which we believe are helpful in making our determination. First, the Court analyzed the history of forfeiture under this country's common law, and concluded that forfeiture has been historically understood as punishment. *Austin*, 113 S.Ct. at 2806-10. We adopt this conclusion.

Next, the Court focused on the "innocent owner" defense contained in the statute under which the forfeiture occurred. *See* 21 U.S.C.A. § 881(a)(4)(C) ("no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner"); *and* § 881(a)(7) ("no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner"). The Court

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[4] We note again the language from *Austin*, where the Court stated that forfeiture has absolutely no correlation to any damages sustained by society or to the cost of enforcing the law, and any relationship between the government's costs and the amount of the sanction is merely coincidental. *Austin*, 113 S.Ct. at 2812, and n. 14. (quoting *United States v. Ward*, 448 U.S. 242, 254 (1980)).

concluded that the statute looked more like a punishment because the exception focused on the culpability of the owner. *Austin,* 113 S.Ct. at 2810-11. Finally, the Court found that the inclusion of an innocent owner defense in the statute revealed a congressional intent to punish only those involved in drug trafficking. *Id.* at 2811.

When we consider the Texas statute under which appellant forfeited his property, we also find an "innocent owner" defense. *See* TEX. CODE CRIM. PROC. ANN. art. 59.02(c)(2) (Vernon Supp. 1994) ("An owner or interest holder's lien in property may not be forfeited under this chapter if the owner or interest holder . . . did not know or should not reasonably have known of the act or omission giving rise to the forfeiture or that it was likely to occur at or before the time of acquiring and perfecting the interest or, if the property is real property, at or before the time of acquiring the ownership interest, security interest, or lien interest"). We can only construe this provision as demonstrating a legislative intent to impose the penalty of forfeiture on those involved in criminal activity, which makes the statute "look more like punishment, not less." *Austin,* 113 S.Ct. at 2811. Moreover, the inclusion of the chapter dealing with drug forfeitures in the Texas Code of *Criminal* Procedure lends further support to our conclusion that the purpose of Chapter 59 is to *punish* drug traffickers.

The teaching of *Halper* is that if a sanction serves the goals of punishment, namely retribution and deterrence, even if it has remedial goals as well, then it should be characterized as punishment for purposes of a double jeopardy analysis. *Halper,* 490 U.S. at 448. *See also Austin,* 113 S.Ct. at 2910 n. 12; *Kurth Ranch,* 62 U.S.L.W. at 4432.

We find that although Chapter 59 may have remedial goals, *see* Article 59.06(c), (h) (providing that funds derived from forfeitures under the statute be used for law enforcement purposes, and programs for treatment of drug abuse and chemical dependency), it must be characterized as punitive, based on the factors delineated in *Austin. Contra Ward v. State*, 870 S.W.2d 659 (Tex. App. – Houston [1st Dist.] 1994, pet. ref'd); *Johnson v. State*, No. 01-93-1077-CR (Tex. App. – Houston [1st Dist.] June 23, 1994, no pet.h.). Therefore, in light of the above Supreme Court decisions, we must conclude that appellant has already been punished for his criminal conduct by the forfeiture of his property, and the Double Jeopardy Clause of the United States Constitution prohibits further punishment by the State for the same incident. Appellant's first point of error is sustained, and we have no need to address his second point regarding the Texas Constitution.

We emphasize that we are not finding the forfeiture statute unconstitutional. We are merely stating that if the State wishes to proceed against an individual by prosecuting him criminally and instituting civil forfeiture proceedings for conduct arising out of the same criminal occurrence, it must do so in the same proceeding. *See Kurth Ranch*, 62 U.S.L.W. at 4434 (holding that because the drug tax constitutes a punishment, it must be imposed during the first prosecution or not at all).

The judgment denying appellant's application for writ of habeas corpus is reversed, and we render judgment that appellant's application is granted.

/s/ Paul C. Murphy
Justice

Judgment rendered and Majority and Dissenting Opinions filed July 21, 1994. Panel consists of Justices Murphy, Ellis and Lee.

Publish – TEX. R. APP. P. 90.

Reversed and Rendered; Majority and Dissenting Opinions filed July 21, 1994.

[SEAL]

In The
Fourteenth Court of Appeals

NO. A14-94-00013-CR

DANNY FANT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 675,838

DISSENTING OPINION

Finding myself in disagreement with the majority members of the panel, I respectfully file my dissent. Appellant, Danny Fant, appeals the trial court's denial of

his application for writ of habeas corpus, asserting that double jeopardy bars his trial for possession of a controlled substance with intent to deliver because the State has previously obtained a forfeiture judgment arising out of the same criminal occurrence. The majority agrees, holding that the forfeiture is "punishment."

I am of the opinion that TEX. CODE CRIM. PROC. ANN. chapter 59 (Vernon Supp. 1994) is remedial in nature. *See Ward v. State*, 870 S.W.2d 659, 663 (Tex. App. – Houston [1st Dist.] 1994, pet. ref'd). Specifically, article 59.06, which provides for the disposition of forfeited property, mandates that forfeited funds and funds derived from the sale of forfeited property shall be used for law enforcement purposes, and drug abuse and chemical dependency treatment programs. TEX. CODE CRIM. PROC. ANN. art. 59.06(c), (h) (Vernon Supp. 1994). Thus, the statute is not punitive and does not constitute punishment.

The majority relies on *United States v. Halper*, 490 U.S. 435 (1989), in which the Supreme Court of the United States held that "under the Double Jeopardy Clause a defendant who has already been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not be fairly characterized as remedial, but only as a deterrent or retribution." *Id.* at 448-49. As the majority recognizes, the Court severely limited this holding:

> What we announce now is a rule for the *rare case*, the case such as the one before us, where a *fixed penalty provision* subjects a *prolific but small-gauge offender* to a sanction *overwhelmingly disproportionate to the damages he has caused*. The

> rule is one of reason: Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.

Id. at 449-50 (emphasis added).

Thus, *Halper* teaches us that if the statute is remedial in nature, then the further analysis to determine whether it qualifies as punishment does not apply. *See Ward*, 870 S.W.2d at 663. As mentioned earlier, the face of the statute itself indicates that it is remedial. *See* TEX. CODE CRIM. PROC. ANN. art. 59.06(c), (h). However, even if the forfeiture statute was punitive rather than remedial, appellant has failed to show this court that his is one of the "rarest cases" contemplated by *Halper*, and how the cash and property forfeited is "overwhelmingly disproportionate to the damage" he has caused. *See Halper*, 490 U.S. at 449-50; *Ward*, 870 S.W.2d at 663.

The majority also analyzes *Austin v. United States*, 113 S.Ct. 2801 (1993) in which the Court held that the excessive fines clause of the Eighth Amendment to the United States Constitution applies to forfeitures. Even if *Austin* stands for the proposition that forfeitures are punishment, the Court left it to the lower courts to consider what factors would appropriately determine whether a forfeiture was "excessive." *Id.* at 2812. We need not develop the factors here because the record before this

court does not contain evidence developed in the forfeiture settlement, or to be developed in the criminal prosecution. Thus, appellant has not shown that the forfeiture is "excessive."

Accordingly, I would overrule appellant's first and second points of error and would affirm the trial court's judgment.

/s/ George T. Ellis
Justice

Judgment rendered and Majority and Dissenting Opinions filed July 21, 1994.

Panel Consists of Justices Murphy, Ellis and Lee.

Publish – TEX. R. APP. P. 90.

Copr.(C) West 1994 No claim to orig. U.S. Govt. works.
632 So.2d 1221
(Cite as: 632 So.2d 1221)

STATE of Louisiana, Plaintiff-Appellee,
v.
1979 CADILLAC DEVILLE and $24.00 U.S. Currency
Seized from Frank L. Wilson,
Defendant-Appellant.
No. 24954-CA.
Court of Appeal of Louisiana,
Second Circuit.
Feb. 28, 1994.
Rehearing Denied March 24, 1994.

State brought civil forfeiture action against automobile seized from owner, who previously pled guilty to attempted possession of cocaine. The First Judicial District Court, Parish of Caddo, C.J. Bolin, Jr., J., ordered forfeiture, and owner appealed. The Court of Appeals, Lindsay, J., held that forfeiture violated double jeopardy clause.

Reversed.

Sexton, J., added additional concurring reasons.

Hightower and Victory, JJ., dissent with written reasons and would grant rehearing.

Richard Ieyoub, Atty. Gen., Baton Rouge, Paul. J. Carmouche, Dist. Atty., John Ford McWilliams, Jr., Asst. Dist. Atty., Shreveport, for plaintiff-appellee.

Blanchard, Walker, O'Quin & Roberts by J. Jay Caraway, Shreveport, for defendant-appellant.

E. Pete Adams, Jr., La. Dist. Attys. Ass'n, Baton Rouge, amicus curiae.

Before SEXTON, NORRIS, LINDSAY, HIGHTOWER and VICTORY, JJ.

LINDSAY, Judge.

A five-judge panel was created in this appeal when one judge of the original three-judge panel dissented to a proposed reversal of the trial court's judgment in this civil forfeiture action. LSA-Const. Art. 5, § 8.

On reargument, we reverse the trial court judgment.

The appellant, Frank L. Wilson, was arrested for possession of cocaine with intent to distribute. During the course of his drug arrest, his 1979 Cadillac and $24 in cash were seized. The appellant subsequently pled guilty to attempted possession of cocaine and was sentenced to serve one year in prison. Thereafter, pursuant to a civil forfeiture action filed by the state, the trial court ordered the forfeiture of appellant's Cadillac and the $24 in cash. The appellant appeals from that judgment, arguing that the forfeiture is a second punishment for the same offense and is violative of protections against double jeopardy contained in the state and federal constitutions. For the following reasons, we reverse.

FACTS

On April 10, 1991, Officer Allen B. Pierce of the Shreveport Police Department observed the appellant driving his 1979 Cadillac northbound on the Clyde Fant Parkway in Shreveport, Louisiana. The appellant was exceeding the posted speed limit. Officer Pierce activated the flashing lights on his patrol car and began pursuit.

The appellant continued to travel northbound at approximately the same rate of speed. Officer Pierce observed the appellant through a plastic bag from the passenger side of the vehicle. The appellant continued along the parkway until he reached a parking lot at Lake Street. He then stopped and parked his vehicle.

Other officers arrived to assist Officer Pierce. The appellant was placed under arrest. A search of his person yielded $24 in cash. In the vehicle, the officers found a test tube containing a white powder residue, which was determined to be cocaine, and a .38 caliber handgun.

Officer Pierce went back to the point on the parkway where the appellant threw the plastic bag from his vehicle. The bag was retrieved and was found to contain seventeen smaller plastic bags, each containing cocaine.

The appellant was charged with possession of cocaine with intent to distribute. On June 11, 1991, he entered a plea of guilty to the lesser charge of attempted possession of cocaine.

The appellant appeared before the court for sentencing on August 16, 1991. He was sentenced to serve one year at hard labor. The appellant was found to have prior convictions for burglary, theft and resisting an officer.

In the meantime, on June 10, 1991, the state filed a petition for an in rem forfeiture of the appellant's vehicle and the money taken from him at the time of his arrest. The petition alleged that the vehicle was used to facilitate the possession, transportation and concealment of cocaine and that the $24 was "the proceeds of a felony

drug sale or was used to facilitate [a] felony drug purchase or sale." Therefore, the state contended that the automobile and the cash were subject to forfeiture under LSA-R.S. 40:2601, et seq.

A forfeiture hearing was held on July 20, 1992. The facts concerning the appellant's guilty plea to attempted possession of cocaine were placed before the court. The state also presented the testimony of the arresting officer who stated that he observed the appellant throwing cocaine from the vehicle and that a test tube containing cocaine residue was found in the vehicle. It was also shown that the appellant's vehicle was purchased for $2,800 and had an odometer reading of 180,000 miles. Further, a towing fee of $50 and storage fees of $2,454.50 had been incurred up to the date of the forfeiture hearing.

In the trial court, the appellant argued that the sole purpose of the forfeiture proceeding was to levy an additional penalty against him, based upon his drug conviction, in violation of constitutional provisions against double jeopardy.

The trial court found that the state fulfilled the requirements of the Louisiana statutes governing forfeiture proceedings. The court found that the state had shown that the automobile was used to transport illegal drugs and therefore was used for a criminal purpose. The court also found that because the case was a civil proceeding, brought against the property itself, double jeopardy did not apply. The trial court signed a judgment on August 14, 1992, ordering the forfeiture of the automobile and the $24 in cash.

The appellant appealed suspensively. In this court he again contends that the forfeiture of his vehicle violates the double jeopardy provisions of the United States and Louisiana constitutions.[1]

A person cannot twice be placed in jeopardy for the same offense. U.S. Const. amend. V; La. Const. art. I., § 15; LSA-C.Cr.P. Art 591; State v. Knowles, 392 So.2d 651 (La.1980). It is well established that the double jeopardy clause of the U.S. Constitution protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; (3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

The appellant claims that the forfeiture of his automobile violates the multiple punishment prong of the double jeopardy clause. He asserts that he has already been punished for his cocaine offense in the criminal proceedings and he is now being punished again for the same offense by the forfeiture of his automobile. We find that, under the facts of this case and in light of the recent pronouncements on the issue of forfeitures by the United States Supreme Court in United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), and Austin v. United States, ___ U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488

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[1] At the forfeiture hearing, no evidence regarding the $24 in cash was presented which tied the money to any drug offense. However, appellant did not argue this issue in the trial court and has not objected on appeal to the forfeiture of the money. Therefore, the propriety of the forfeiture of the cash is not before this court for decision.

(1993), the forfeiture of the automobile does constitute punishment in violation of the double jeopardy clause.[2]

DISCUSSION

LSA-R.S. 40:2601, et seq., is patterned after the federal drug forfeiture statute contained in 21 U.S.C. § 881. State v. $77,014, 607 So.2d 576 (La.App. 3d Cir.1992), writ denied 612 So.2d 61 (La.1993). The Louisiana forfeiture statute provides a comprehensive statutory scheme for the forfeiture of instrumentalities and profits of drug trafficking. The statute sets forth the property subject to forfeiture, prescribes that all property declared forfeited

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[2] No objection has been raised by either party to the traditional double jeopardy analysis. Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), employs the "same elements" test and specifies that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. In United States v. Dixon, ___ U.S. ___ 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993) the United States Supreme Court reaffirmed its reliance on the Blockburger test in evaluating double jeopardy claims, but it overruled Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), which had also incorporated the broader "same conduct" test. However, in Louisiana the similar "same evidence" test continues to be applied in evaluating double jeopardy claims. State v. Carouthers, 607 So.2d 1018 ((La.App. 3d Cir. 1992); State v. Powell, 598 So.2d 454, 469 (La.App. 2d Cir.1992). The test provides that if the evidence necessary to support the second charge would have been sufficient to support the former charge, double jeopardy prohibits the second prosecution. State v. Girouard, 615 So.2d 29 (La.App. 3d Cir.1993).

vests in the state on the commission of the illegal conduct giving rise to the forfeiture, and makes provisions for the seizure, disposition and use of the seized property. LSA-R.S. 40:2603-2606, 2608-2611, 2615-2616.

In One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965), the United States Supreme Court recognized a distinction between contraband per se, i.e., objects, the possession of which, without more, constitutes a crime; and other items which are legal to possess but are treated as contraband because they are used in the commission of a crime. Louisiana courts have also recognized this distinction and have held that things which may be forfeited because they are the immediate instruments of a crime, but are not ordinarily illegal to possess, are classified as derivative contraband. Greenburg v. One Hundred Seventy-Five Thousand Dollars in Cash, 517 So.2d 430 (La.App. 1st Cir.1987).

LSA-R.S. 40:2603 and 2604 set forth the conduct giving rise to a forfeiture and list property subject to forfeiture, i.e., contraband per se and derivative contraband. LSA-R.S. 40:2612 also provides that a civil in rem forfeiture proceeding may be brought against such property which is to be seized. In an in rem proceeding, pursuant to LSA-R.S. 40:2612, the state has the initial burden of proving the existence of probable cause for the forfeiture of the property. If the state establishes probable cause to justify the forfeiture, then the claimant has the burden of showing, by a preponderance of the evidence, that the claimant's interest in the property is not subject to forfeiture. State v. Albritton, 610 So.2d 209 (La.App. 3rd Cir.1992).

The concept of forfeiture dates back to English common law. See discussion in Austin v. U.S. supra. The jurisprudence provides that the double jeopardy clause does not apply to civil forfeiture proceedings where the forfeiture can properly be characterized as remedial. The definition of "remedial" is essential to the decision of this case.

In United States v. One Assortment of 89 Firearms, 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984), the defendant was charged with dealing in firearms without a license. Even though the defendant was acquitted of the criminal charges, the government instituted civil in rem forfeiture proceedings against the firearms. The United States Supreme Court found that the purpose of the statute under consideration was to keep dangerous weapons out of the hands of unlicensed dealers and that this purpose was remedial. Therefore, the Court found that the forfeiture was not barred by double jeopardy because the forfeiture of dangerous weapons is remedial in nature and does not constitute punishment.

In One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 93 S.Ct. 489, 34 L.Ed.2d 438 (1972), the United States Supreme Court considered whether the forfeiture of jewels brought into the United States without paying customs duties was violative of the double jeopardy clause. Although the owner of the jewels was acquitted on federal charges of smuggling the items into the United States with the intent to defraud the government, the Supreme Court rejected the argument that the forfeiture violated the constitutional guarantee against double jeopardy. The Court stated: If for no other reason, the forfeiture is not barred by the Double Jeopardy Clause of the

Fifth Amendment because it involves neither two criminal punishments. "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense." [Citations omitted.]

The Court then went on to find that the forfeiture of the jewels served a remedial purpose, stating as follows: It prevents forbidden merchandise from circulating in the United States, and, by its monetary penalty, it provides a reasonable form of liquidated damages for violation of the inspection provisions and serves to reimburse the Government for investigation and enforcement expenses. In other contexts we have recognized that such purposes characterize remedial rather than punitive sanctions. [Citations omitted.] Moreover, it cannot be said that the measure of recovery fixed by Congress in § 1497 is so unreasonable or excessive that it transforms what was clearly intended as a civil remedy into a criminal penalty.

The import of United States v. One Assortment of 89 Firearms, supra, and One Lot Emerald Cut Stones v. United States, supra, is that double jeopardy did not occur because the property taken was contraband per se, not derivative contraband, and the forfeiture was solely remedial. The actual possession of the firearms by an unlicensed dealer was illegal, as was the possession of the stones upon which customs duties had not been paid.

In United States v. Halper, supra, the United States Supreme Court held that the double jeopardy clause prohibits a second sanction that may not be fairly characterized as remedial.[3] In Halper, the manager of a medical laboratory which provided services to Medicare patients submitted 65 false Medicare claims totalling $585. the defendant was indicted and convicted under federal law for filing false claims. The federal law under which the defendant was convicted also provided for the imposition of civil sanctions. The government instituted an action to collect civil penalties of $2,000 for each violation, totalling $130,000, an amount far in excess of the aggregate amount of the false claims made. The District Court found this sanction, in light of Halper's previous criminal punishment, would violate the double jeopardy clause. Accordingly, the District Court granted judgment in favor of the government on only eight of the 65 counts against Halper, thereby imposing a civil penalty of $16,000. This was the amount the District Court found was necessary

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[3] We note that several cases have found that Halper does not apply to forfeiture proceedings. See United States v. McCaslin, 959 F.2d 786 (9th Cir.1992), cert denied, ___ U.S. ___, 113 S.Ct. 382, 121 L.Ed.2d 292 (1992); United States v. A Parcel of Land With a Building Located Thereon, 884 F.2d 41 (1st Cir.1989); United States v. Certain Real Property and Premises, 954 F.2d 29 (2d Cir.1992), cert. denied, ___ U.S. ___, 113 S. Ct. 55, 121 L.Ed.2d 24 (1992); People v. 1988 Mercury Cougar, 154 Ill.2d 27, 180 Ill.Dec. 323, 607 N.E.2d 217 (1992). The basic premise of these cases is that forfeitures of instrumentalities of drug offenses are distinguishable from the imposition of monetary sanctions discussed in Halper. That view was negated by Austin v. United States, which implicitly applied, in part, the reasoning of Halper to forfeiture proceedings.

to make the government whole regarding its losses in the prosecution of the claims against Halper.

The government moved for reconsideration. Upon reconsideration, the District Court admitted that it erred and did not have discretion to award penalties on only eight of the 65 counts. The $2,000 penalty was mandatory for all 65 counts against Halper. However, the District Court remained firm in its conclusion that a $130,000 penalty could not be imposed because, under the circumstances, it violated the double jeopardy clause's prohibition against multiple punishment. The District Court then found that the Federal False Claims Act was unconstitutional as applied to Halper and amended the judgment to award the government only double damages of $1,170 and costs of the civil action.

The government appealed to the United States Supreme Court. Under these facts, the United States Supreme Court agreed with the District Court that imposition of the civil sanctions violated double jeopardy.

In finding that the sanctions imposed upon the defendant in the Halper case violated the double jeopardy clause, the United States Supreme Court focused on the fact that the amount of the sanction was greatly disproportionate to the amount received by the defendant in making the false claims. The Court stated that civil, as well as criminal, sanctions constitute punishment when the sanction, as applied in the individual case, serves the goal of punishment. The Court stated that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment.

The Court further stated that, under the double jeopardy clause, a defendant who has already been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not be fairly characterized as remedial, but only as a deterrent or retribution. The Court went on to explain the ruling as follows: The rule is one of reason: Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalties sought in fact constitute a second punishment.

Halper stated that the only proscription established by the ruling is that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole. Further, Justice Kennedy pointed out in his concurrence that where the civil penalty imposed in a second proceeding bears no rational relationship to the damages suffered by the Government, it must be considered punishment for purposes of double jeopardy.

In Austin v. United States, supra, the United States Supreme Court provided further guidance as to the meaning of "punishment" and "remedial" and the occasions when the double jeopardy clause may prohibit forfeitures as constituting additional punishment. The Court distinguished forfeitures from proceedings imposing civil

sanctions, as in Halper, supra, finding the forfeiture of property is a penalty that has absolutely no correlation to any damages sustained by society or to the cost of enforcing the law.[4]

In Austin, supra, the defendant pled guilty under South Dakota law to one count of possession of cocaine with intent to distribute. The United States then instituted forfeiture proceedings in federal court under 21 U.S.C. § 881 against Austin's mobile home and auto body shop where a drug transaction occurred. Austin claimed that the excessive fines clause of the eighth amendment applies to forfeitures and that, in this case, the forfeiture constituted an excessive fine.[5]

The Supreme Court found that the eighth amendment did apply and remanded the case for further consideration of whether the forfeiture constituted an excessive fine. Although in Austin the claimant did not allege a violation of the double jeopardy clause, in footnote four of the opinion, the Court explored the application of constitutional protections to forfeitures. In the

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[4] Insofar as double jeopardy principles are concerned, contrary to the dissenting opinions in the present case, the forfeiture of this automobile is not rationally related to reimbursing the state for investigating and prosecuting the drug offense which Wilson committed.

[5] In Austin, the defendant was convicted under state law of a drug offense. The forfeiture proceeding was instituted by the federal government. Separate prosecutions by state and federal authorities are not violative of double jeopardy. Abbate v. United States, 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959). Therefore Austin was precluded from raising double jeopardy objections in the forfeiture proceeding.

context of double jeopardy, the court stated: the Double Jeopardy Clause has been held not to apply in civil forfeiture proceedings, but only in cases where the forfeiture could properly be characterized as remedial. See United States v. One Assortment of 89 Firearms, 465 U.S. 354, 364 [104 S.Ct. 1099, 1105, 79 L.Ed.2d 361] (1984); One Lot Emerald Cut Stones v. United States, 409 U.S 232, 237 [93 S.Ct. 489, 493, 34 L.Ed.2d 438] (1972); see generally United States v. Halper, 490 U.S. 435, 446-449 [109 S.Ct. 1892, 1900-1902, 104 L.Ed.2d 487] (1989) (Double Jeopardy Clause prohibits second sanction that may not be fairly characterized as remedial). [Emphasis supplied.]

In Austin, supra, the Supreme Court rejected the same claims relied upon by the state and the dissent in the instant case, i.e., that the forfeiture of derivative contraband is remedial. The Court found that the forfeiture of instrumentalities of a drug offense, derivative contraband such as residences or automobiles, is not remedial and constitutes punishment. The court stated: The Government argues that §§ 881(a)(4) and (a)(7) are not punitive but, rather, should be considered remedial in two respects. First, they remove the "instruments" of the drug trade "thereby protecting the community from the threat of continued drug dealing." [Citation omitted.] Second, the forfeited assets serve to compensate the Government for the expense of law enforcement activity and for its expenditure on societal problems such as urban blight, drug addiction, and other health concerns resulting from the drug trade. [Citation omitted.] In our view, neither argument withstands scrutiny. Concededly, we have recognized that the forfeiture of contraband itself may be characterized as remedial because it removes

dangerous or illegal items from society. See United States v. One Assortment of 89 Firearms, 465 U.S. 354, 364, 104 S.Ct. 1099, 1105, 79 L.Ed.2d 361 (1984). The Court, however, previously has rejected government's attempt to extend that reasoning to conveyances used to transport illegal liquor. See One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699, 85 S.Ct. 1246, 1250, 14 L.Ed.2d 170 (1965). In that case it noted: "There is nothing even remotely criminal in possessing an automobile." Ibid. The same, without question, is true of the properties involved here, and the Government's attempt to characterize these properties as "instruments" of the drug trade must meet the same fate as Pennsylvania's effort to characterize the 1958 Plymouth Sedan as "contraband." The Government's second argument about the remedial nature of this forfeiture is no more persuasive. We previously have upheld the forfeiture of goods involved in customs violations as "a reasonable form of liquidated damages." One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237, 93 S.Ct. 489, 493, 34 L.Ed.2d 438 (1972). But the dramatic variation in the value of conveyances and real property forfeitable under §§ 881(a)(4) and (a)(7) undercut any similar argument with respect to those provisions. The Court made this very point in Ward: the "forfeiture of property . . . [is] a penalty that ha[s] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law." [U.S. v. Ward] 448 U.S. [242] at 254, 100 S.Ct. [2636] at 2644 [65 L.Ed.2d 742] [(1980)]. Fundamentally, even assuming that §§ 881(a)(4) and (a)(7) serve some remedial purpose, the Government's argument must fail. "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but

rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." Halper, 490 U.S. at 448, 109 S.Ct. at 1902 (emphasis added). In light of the historical understanding of forfeiture as punishment, the clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish, we cannot conclude that forfeiture under §§ 881(a)(4) and (a)(7) serves solely a remedial purpose.

Simply stated, the United States Supreme Court reasoned that the forfeiture of derivative contraband is not remedial.[6]

The Court went on to find that under the federal drug forfeiture statute, forfeiture of residences and automobiles, which are not contraband per se, constitutes payment to a sovereign as punishment for an offense.

Further, the Austin decision dismissed the fictional distinctions between in rem and in personam forfeitures. Austin held that the forfeiture of real property tainted by drug offenses is a punishment for the defendant's bad acts, whatever label it is given. The United States Supreme Court admonished the government not to rely on the fiction that an in rem proceeding is against the

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[6] The decision in the present case does not hold that the forfeiture of contraband per se is prohibited by double jeopardy. Rather, forfeiture of contraband per se, which is remedial under Austin, continues to be governed by United States v. One Assortment of 89 Firearms, supra, and One Lot Emerald Cut Stones v. United States, supra.

property and not against the owner to support the government's argument that such forfeitures do not punish the owner. Austin v. United States, supra note 9, ___ U.S. at ___, 113 S.Ct. at 2808-2809. The Court found that a forfeiture based on the owner's acts has historically been understood as imposing punishment.

Although not specifically deciding a double jeopardy claim in Austin, the Court's reasoning makes it clear that double jeopardy applies in the instant case because forfeiture of derivate contraband is not solely remedial, and therefore it constitutes punishment. These are the criteria for the application of double jeopardy. In applying the criteria for double jeopardy to this case, we must conclude that the forfeiture at issue here constitutes a second punishment for one offense.

As stated earlier, the forfeiture statute used by the state in the present case is modeled after the federal drug forfeiture statute discussed in Austin v. United States, supra. Pursuant to the reasoning in Austin, we are compelled tc find that the double jeopardy clause of the state and federal constitutions apply to this case. Under the clear pronouncements of the United States Supreme Court, double jeopardy applies where the purpose of a forfeiture is not solely remedial. The Court further stated that the forfeiture of instrumentalities of drug offenses, such as residences and automobiles, is not remedial but constitutes punishment.

Further, we find that under the "same evidence" test discussed above, double jeopardy applies in this case. LSA-R.S. 40:2603 provides that the conduct giving rise to

forfeiture is "an act or omission punishable by confinement for more than one year under R.S. 40:961, et seq., whether or not there is a prosecution or conviction related to the act or omission." LSA-R.S. 40:961, et seq., are the statutes in this state proscribing illegal drug activity. Under the clear wording of our state's forfeiture statute, all of the state statutes prohibiting illegal drug activity which carry a penalty of confinement for more than one year have been incorporated and made the foundation of forfeitures.

The facts of the present case are distinguishable from United States v. Millan, 2 F.3d 17 (2d Cir.1993), which held that a forfeiture and a criminal prosecution did not violate double jeopardy principles because, in that case, the criminal indictment and the forfeiture constituted a single proceeding against the defendant. In Millan, the government charged the defendants with conspiracy to distribute massive amounts of cocaine and, in the same indictment, included a criminal forfeiture count for properties derived from or used to facilitate drug violations. The defendants settled the forfeiture count, thereby forfeiting some of the seized property. Then the defendants claimed that they had already been punished and the government's action in proceeding with the criminal charge of conspiracy to distribute cocaine violated their rights against being subjected to double jeopardy. The court found that the forfeiture and the criminal prosecution were "but different prongs of a single prosecution."

In the present case, the state did not employ a single proceeding to prosecute the defendant on the criminal charge and to obtain the forfeiture of the automobile. The

defendant was charged with and pled guilty to the criminal charge and was sentenced accordingly. Unlike the Millan case, the forfeiture was not made a part of the criminal indictment, but was instituted in a separate in rem civil proceeding. Here, the prosecution has consistently argued that the forfeiture proceeding was a separate civil action. Further, the forfeiture proceeding in this case was based on state statutes modeled after a federal forfeiture statute contained in 21 U.S.C. § 881. In Millan, the government proceeded under 21 U.S.C. § 853, which is a criminal forfeiture proceeding.[7]

As previously noted, the prosecution has not employed a single proceeding against the defendant to obtain both the criminal conviction and the forfeiture. Thus, it cannot be said that the forfeiture and the criminal prosecution were different prongs of a single prosecution. Therefore, the forfeiture in the present case constitutes an additional punishment and violates double jeopardy.

Under the facts of this case, the forfeiture of the appellant's automobile cannot be said to serve a solely remedial purpose, but rather is punitive. Because the appellant pled guilty to the drug offense in the criminal proceedings and was sentenced under the criminal statute proscribing that behavior, he cannot now be punished

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[7] In the instant case, the state also relies upon State v. Johnson, 632 So.2d 817 (La.App. 4th Cir.1994). In Johnson, the Fourth Circuit held that the pronouncements and directive of Austin v. U.S., supra, has no application to a Fifth Amendment claim of double jeopardy. We reject this view for the reasons outlined in this opinion and decline to follow State v. Johnson, supra.

a second time, by means of the instant forfeiture of derivative contraband, for the same criminal offense.

We do not hold that all derivative contraband forfeitures are prohibited. The United States Supreme Court in Halper, supra, noted that the decision in that case did not "prevent the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding. In a single proceeding, the multiple-punishment issue would be limited to ensuring that the total punishment did not exceed that authorized by the legislature." We perceive no reason why a procedure could not be developed and implemented, creating a single proceeding which would solve the double jeopardy problem and thereby allow the forfeiture of the derivative contraband used by drug offenders.

CONCLUSION

For the reasons stated above, we find that the forfeiture of the appellant's automobile is barred by the prohibitions against double jeopardy. Therefore, the judgment of the trial court ordering forfeiture of the automobile is reversed. The property, or its value, is ordered restored to the appellant.[8]

REVERSED.

SEXTON, J., adds additional concurring reasons.

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[8] In its supplemental brief, the State informed this court that the 1979 Cadillac, which is the subject of the forfeiture in this case, had been sold by mistake.

HIGHTOWER and VICTORY, JJ., dissent with written reasons.

SEXTON, Judge, concurring.

I agree with the holding in this opinion that Austin v. United States, ___ U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), and United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), require a determination that a subsequent civil forfeiture by a sovereign that has previously obtained a criminal conviction amounts to double jeopardy under the United States Constitution. Try as I might, I have been unable to intellectually avoid these United States Supreme Court holdings in my consideration of the instant case.

There are obvious ways to avoid the Austin/Halper mandate, but implementation will take time. Thus, there will once again be significant disruption in the asset forfeiture process as a result of what I suggest are intellectual gymnastics. Nevertheless, from a practical standpoint, we will eventually return to the present situation with little, if any, theoretical advancement of the law.

I, therefore, reluctantly agree with this opinion.

HIGHTOWER, Judge, dissenting.

This ruling will effectively preclude, on double jeopardy grounds, all derivative contraband forfeitures instituted subsequent to prosecution.

Under the rationale of Austin, supra, because such civil forfeitures consistently serve to punish the defendant in some measure even when partially remedial in purpose, the procedure is subject to the limitations of the

Excessive Fines Clause of the Eighth Amendment. Likewise, upon recalling One 1958 Plymouth Sedan v. Pennsylvania, supra, the Austin court rejected the government's argument that the removal of properties, or an automobile, used for illegal dealings, could be characterized as solely remedial and, thus, could escape scrutiny for excessiveness.

However, the present case concerns a claim of double jeopardy, not excessiveness. The double jeopardy analysis crafted in Halper, supra, a civil fines case discussing the Fifth Amendment, prohibits a second sanction to the extent, and only to the extent, that it cannot fairly be characterized as remedial. Conversely, to the extent that a remedial purpose is served, the procedure will clear the double jeopardy bar.

Irwin Halper, importantly, faced a civil penalty ($2,000 for each of 65 separate false Medicare claims) designed to substitute for the government's recovery of damages following, and caused by, the fraudulent acts committed upon the United States Government. Yet, notwithstanding this remedial goal of compensation, the resulting sum overwhelmed any realistic estimate of the government's pecuniary loss, leading the court to presume the sanction to be punitive.

Nevertheless, even under the pronouncements of Halper, I do not deem the present circumstances to depict that "rare case" implicating the Double Jeopardy Clause. Rather, the forfeiture of appellant's relatively antiquated automobile is not – borrowing the language and reasoning of Halper – so "overwhelmingly disproportionate" to the damages caused, nor so "extreme [ly] . . . divorced"

from any proper remedial purpose as to offend the Fifth Amendment. Furthermore, in the in rem forfeiture of instrumentalities of crime, double jeopardy previously has found no application. United States v. Cullen, 979 F.2d 992 (4th Cir.1992); United States v. McCaslin, 959 F.2d 786 (9th Cir.1992).

Under the majority decision, a forfeiture of "derivative contraband" can never be remedial. This rationale, however, fails to recognize that each Bill of Rights protection demands separate, distinct considerations in its application. For instance, upon identifying a breach of the Excessive Fines Clause of the Eighth Amendment, the ensuing remedy simply reduces the sanction. On the other hand, consistent with the present opinion, a double jeopardy violation of the Fifth Amendment triggers an absolute bar to the second proceeding. Logically, then, the same standard should not control both Eighth and Fifth Amendment issues, nor can the Austin excessive fines test apply in a double jeopardy analysis. See State v. Johnson, 632 So.2d 817 (La.App. 4th Cir.1994).

I respectfully dissent.

VICTORY, Judge, dissenting.

I agree with much of what is stated in Judge Hightower's dissent, and add the following comments.

In Halper, a Fifth Amendment case, the United States Supreme Court stated that "a civil sanction that cannot fairly be said solely to serve a remedial purpose . . . is punishment." In Austin, the Court, quoting this language, held that because such a sanction is not solely remedial, but partly punishment, it is subject to the

Excessive Fines Clause of the Eighth Amendment. In my view, the majority misconstrues this "solely remedial" language to conclude that a derivative contraband forfeiture in a civil proceeding, subsequent to a criminal conviction, necessarily violates the double jeopardy clause of the Fifth Amendment because it is not solely remedial. The majority seems to conclude that a sanction that is not solely remedial must be solely punishment. But, as we know from Halper and Austin, civil sanctions may advance punitive and remedial goals at the same time.

Certainly, under Halper, a subsequently civil sanction, such as a forfeiture, has double jeopardy implications. The Supreme Court in Halper recognized that any civil sanction, when viewed from the defendant's perspective, carries a sting of punishment although the sanction might be remedial. Therefore, the precise holding in Halper was stated as follows: We therefore hold that under the double jeopardy clause, a defendant who is [sic] already been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution. [Emphasis added.]

Under Halper, the double jeopardy inquiry does not end with a determination that the civil sanction might punish the defendant, as well as satisfy remedial goals. If such were the case, no civil sanction would have been possible in Halper, yet the Supreme Court remanded the case to the trial court for the government to prove and recover its demonstrated costs, clearly a remedial goal. However, just as clearly, Halper will feel the sting of punishment when he has to pay those costs.

In reaching its conclusion, the Halper court said: The rule is one of reason: Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment. We must leave to the trial court the discretion to determine on the basis of such an accounting the size of the civil sanction the Government may receive without crossing the line between remedy and punishment.

Here, the record shows that at the time of forfeiture Wilson's car had 180,000 miles on-it and was only $2,800 when purchased by him. We can easily conclude that the forfeiture of the car is rationally related to the remedial goal of compensating the government for its costs in investigating and prosecuting Wilson, and is not so "overwhelmingly disproportionate" to those costs as to implicate the double jeopardy clause.

Even if we could not make such a determination from this record, we would be required to follow Halper and remand to the trial court for a determination of the government's costs arising from the investigation and prosecution of Wilson. If the government's costs were shown to exceed the value of the forfeited automobile, per Halper there would be no double jeopardy violation because recouping government costs is remedial, not punitive. If the automobile's value was shown to have exceeded the government's costs, the trial court would

have to decide if the value of the forfeited automobile was so "overwhelmingly disproportionate" to the "rough remedial justice" standard of Halper that a reimbursement to the defendant was required for the excess.

In State v. Johnson, 632 So.2d 817 (La.App. 4th Cir.1994), the Fourth Circuit rejected the majority's arguments, and followed the rationale of Halper, as set forth in this dissent. This court should follow State v. Johnson.

For these reasons, I dissent from the majority opinion.

APPLICATION FOR REHEARING

Before SEXTON, NORRIS, LINDSAY, HIGHTOWER and VICTORY, JJ. Rehearing denied.

Supreme Court, U.S.
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No. 94-243

In The

Supreme Court of the United States

October Term, 1994

JERRY WAYNE TILLEY,
SUSAN WELLS TILLEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL APPENDIX

ADDITIONAL REASON FOR GRANTING WRIT NOT AVAILABLE AT TIME OF INITIAL FILING

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ADDITIONAL REASON FOR GRANTING CERTIORARI THE CIRCUITS ARE NOW IN CONFLICT

Expressly rejecting the Fifth Circuit's opinion below, the Ninth Circuit Court of Appeals has now held that the forfeiture of drug "proceeds" under Title 21 U.S.C. §881(a)(1)(6) constitutes "punishment" for Fifth Amendment Double Jeopardy purposes, creating a conflict between the United States Courts of Appeals for the Fifth and Ninth Circuits as to this very same matter.

VERY RECENT NINTH CIRCUIT DECISION EXPRESSLY REJECTS THE FIFTH CIRCUIT'S OPINION BELOW

In their opinion below, the Court of Appeals for the Fifth Circuit held "that the forfeiture of unlawful proceeds of illegal drug sales does not constitute punishment" for double jeopardy purposes, because rather than serving any punitive purpose, the "forfeiture of proceeds of illegal drug sales serves the ***wholly remedial*** purposes of reimbursing the government . . . and society" (emphasis supplied), and because "the forfeiting party loses nothing to which the law ever entitled him"[1] where

[1] Contrary to the Fifth Circuit's analogy that the "forfeiture of illegal [drug] proceeds [is] much like the confiscation of stolen money from a bank robber" [See: ***U.S. v. Tilley, Supra,*** original appendix pp. 10a-12a], this Court in ***U.S. v. 92 Buena Vista Avenue, Rumson,*** ___ U.S. ___, 113 S.Ct. 1126, 1135 (1993), made clear that prior to the 1978 amendment of the Comprehensive Drug Abuse Prevention and Control Act of 1970, there was no such forfeiture of the "proceeds" from the sale of contraband or stolen property [See: Petition pp. 10-11].

"the property taken by the government was not derived from lawful activities." ***U.S. v. Tilley,*** 18 F.3d 295, 299, 300 (5th Cir. 1994), at original appendix pp. 3a-4a, 7a, and 10a.

More recently, the United States Court of Appeals for the Ninth Circuit in ***U.S. v. $405,089.23 U.S. Currency,*** ___ F.3d ___, Slip Op. pp. 7-10, 1994 WL 476736 (9th Cir. July

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> "We are not aware of any common-law precedent for tracing proceeds traceable to an unlawful exchange as a fictional wrongdoer subject to forfeiture. . . . They [prior forfeiture and confiscation laws] applied to stolen goods, but they did not apply to the proceeds from the sale of stolen goods." ***U.S. v. 92 Buena Vista Avenue, Rumson,*** ___ U.S. ___, 113 S.Ct. 1126, 1135 (1993).

Moreover, as the Ninth Circuit Court of Appeals very recently noted, "Despite the government's argument, the statutes [including §881(a)(6) is] not limited to the proceeds of illegal activity." ***U.S. v. $405,089.23 U.S. Currency,*** ___ F.3d ___, Slip Op. pp. 7-10, 1994 WL 476736 (9th Cir. July 12, 1994) [a copy of the slip opinion, which is not yet released for publication, is included herein].

> "The so-called narcotics proceeds forfeiture statute, 21 U.S.C. §881(a)(6), applies . . . as well . . . to any money which is 'used or intended to be used to facilitate any violation of this subchapter'. . . . This statutory language is not limited to criminal proceeds – that is, money that has been furnished in exchange for drugs. Rather than rendering only the profits of drug dealers subject to forfeiture, the statute applies to nearly any money that is involved in a narcotics transaction in some fashion. In addition to narcotics proceeds, the statute renders forfeitable money that someone intends to use to purchase drugs, or even money that someone intends to use to purchase a car or boat in order to facilitate an illegal narcotics transaction."

12, 1994) [a copy of the slip opinion, which is not yet released for publication, is included herein] expressly rejected the Fifth Circuit opinion below, holding that the forfeiture of illegal drug "proceeds" under §881(a)(1)(6) constitutes "punishment" for Fifth Amendment Double Jeopardy purposes.

> "The government argues that the ***Austin*** Court's reasoning does not apply to the forfeitures in this case. It asserts that this forfeiture involves only narcotics proceeds, and that such a forfeiture is entirely remedial. The government's position finds support in a recent Fifth Circuit case. See ***United States v. Tilley,*** 18 F.3d 295, 300 (5th Cir. 1994) (stating that the forfeiture of illegal proceeds does not constitute punishment). We nonetheless reject that argument. We do so because the government fails to recognize the legal standard that ***Austin*** established. . . .
>
> "As the Supreme Court did in ***Austin,*** we conclude that the forfeiture statutes at issue here [§881(a)(1)(6)] do not serve solely a remedial purpose. Accordingly, 'even assuming that [these statutes] serve some remedial purpose, the Government's argument must fail.' (citation omitted). The civil forfeiture the government seeks to impose constitutes 'punishment.' Because the government is attempting to exact this form of 'punishment' in a separate proceeding from the claimants' criminal trials, this action is barred by the Double Jeopardy Clause." ***U.S. v. $405,089.23 U.S. Currency,*** ___ F.3d ___, slip op. pp. 7, 9, and 10, 1994 WL 476736 (9th Cir. 1994) [included herein].

Relying upon this Court's analysis in ***Austin v. U.S.***, 509 U.S. ___ (1993), and adopting reasoning almost identical to that proffered by Petitioners in the Court of Appeals below,[2] the Ninth Circuit concludes that the forfeiture of "proceeds" under §881(a)(1)(6) is "punishment" for Fifth Amendment Double Jeopardy purposes.

> "We believe that the only fair reading of the Court's decision in ***Austin*** is that it resolves the 'punishment' issue with respect to forfeiture cases for purposes of the Double Jeopardy Clause as well as the Excessive Fines Clause. . . . In light of the decision in ***Austin,*** and applying the ***Halper*** test here, we find the conclusion inescapable that civil forfeiture under . . . 21 U.S.C. §881(a)(6) constitutes 'punishment' which triggers the protections of the Double Jeopardy Clause. . . .
>
> "Under ***Austin,*** in order to determine whether a forfeiture constitutes 'punishment,' we must look to the entire scope of the statute which the government seeks to employ, rather than to the characteristics of specific property the government seeks to forfeit. . . . [T]he government appears to rely principally on its argument that the res consists entirely of illegal ***proceeds*** . . . and that they therefore do not impose 'punishment.' This argument not only misconceives the legal standard established in ***Austin***

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[2] Petitioners set out this same argument in their Petition for Writ of Certiorari before this Court [See: Petition, pp. 4-20], noting that the "Fifth Circuit Panel Opinion . . . completely ignores the very specific criteria recently established by this Court in ***Austin v. U.S.***, 509 U.S. ___ (1993) for determining whether a forfeiture constitutes punishment. . . . "

but also misstates the scope of the statutes involved. In determining that forfeitures under §§881(a)(4) and (a)(7) constituted 'punishment' under the ***Halper*** test, the ***Austin*** Court relied on three facts. . . .

"First because of 'the historical understanding of forfeiture as punishment,' . . . there is a strong presumption that ***any*** forfeiture statute does not serve solely a remedial purpose. Second, where such a statute focuses on the culpability of the property owner by exempting innocent owners or lienholders, it is likely that the enactment serves at least in part to deter and punish guilty conduct. Finally, where Congress has tied forfeiture directly to the commission of specified offenses, it is reasonable to presume that the forfeiture is at least partially intended as an additional deterrent to or punishment for those violations of law.

"These principles dictate that forfeiture under the statutes at issue in this case [21 U.S.C. §881(a)(6)] constitutes 'punishment.' " ***U.S. v. $405,089.23 U.S. Currency,*** ___ F.3d ___, slip op. pp. 7-8, 1994 WL 476736 (9th Cir. 1994) (citations omitted) [included herein].

As a consequence there now exists a direct conflict between these two Circuit Courts of Appeal which did not exist at the time of the original filing of the Petition for Writ of Certiorari herein. As Rule 10.1(a) of the Rules

of this Court expressly provides, this is an additional reason to grant the writ.[3]

Respectfully submitted,

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[3] **"Rule 10. Considerations Governing Review on Writ of Certiorari**

.1 . . . A petition for writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter. . . . " Rule 10.1(a) Supreme Court Rules.

CITE AS: 1994 WL 476736 (9th Cir. (CAL.)))

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

$405,089.23 U.S. CURRENCY,
et al., Defendants.

Charles ARLT; James Wren;
Payback Mines,

Claimants-Appellants.

No. 93-55947
United States Court of Appeals,
Ninth Circuit.
Submitted July 12, 1994.*

Filed September 6, 1994.

Appeal from the United States District Court for the Central District of California A. Wallace Tashima, District Judge, Presiding

Charles Wesley Arlt, Lompoc, California, and James Eli Wren, Lompoc, California, pro se, for the claimants-appellants.

Mark A. Feldman, Assistant United States Attorney, Los Angeles, California, for the plaintiff-appellee.

Before: Cecil F. Poole and Stephen Reinhardt, Circuit Judges, and Jack E. Tanner,** District Judge.

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*The panel unanimously finds this case suitable for disposition without oral argument. Circuit Rule 34-4.

**Honorable Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

REINHARDT, Circuit Judge:

This case involves the constitutional limits on the government's ability to seek criminal penalties and civil forfeiture based on the same violations of law. The government brought a criminal prosecution against the claimants at approximately the same time as it instituted this separate and parallel civil forfeiture action under 18 U.S.C. s 981(a)(1)(A) and 21 U.S.C. s 881(a)(6). The question is whether the government violated the Double Jeopardy Clause of the Fifth Amendment by obtaining convictions in the criminal case and then continuing to pursue the forfeiture action. We answer the question in the affirmative and reverse the order of forfeiture.

I.

Claimants James Wren, Charles Arlt, and Payback Mines appeal pro se the forfeiture of their property following Wren and Arlt's criminal convictions of various counts of conspiracy and money laundering. In the criminal case, Arlt, Wren, and several others had been accused of conducting a large-scale methamphetamine manufacturing operation. Through a series of front corporations, including Payback Mines, the defendants had sought to create the appearance that they were engaging in legitimate gold mining activities.

The government instituted this civil FORFEITURE action on June 17, 1991, five days after the grand jury issued a superseding indictment in the parallel criminal case. The FORFEITURE complaint listed several hundred thousand dollars' worth of property: $405,089.23 in a Security Pacific Bank account; $8,929.93 in three Bank of

America accounts; $123,000 in cash and 138 silver bars seized at Mayhill Bail Bonds; one Bell 47 G-2 helicopter; one shrimp boat; a Piper 6 Cherokee airplane; and eleven automobiles and one boat purchased at an auction. The government argued that these pieces of property were connected to the offenses that were the subject of the parallel criminal case. It claimed that the property was forfeitable on two independent grounds: as PROCEEDS of illegal narcotics transactions under 21 U.S.C. s 881(a)(6), and as property "involved in" money laundering violations under 18 U.S.C. s 981 (a)(1)(A). Arlt, Wren, and Payback Mines filed claims to the res. Pursuant to a stipulation between the parties, the district court effectively stayed the civil FORFEITURE action pending the completion of the parallel criminal case.

The criminal case terminated on March 27, 1992, with the convictions of Arlt, Wren, and their codefendants. Over eight months later, on December 4, the government filed a motion for summary judgment in the parallel forfeiture action. The government's motion relied on the criminal conviction, a declaration submitted by I.R.S. Special Agent Phillip Mullins, and various pieces of documentary evidence. Asserting that this evidence established probable cause and therefore shifted the burden of proof to the claimants, see 19 U.S.C. s 1615, the government claimed that the claimants had failed to demonstrate that the property was not subject to forfeiture.

On April 1, 1993, the district court granted the government's motion and entered a judgment ordering that the entire res be forfeited to the United States. Adopting the government's proposed statement of uncontroverted

facts and conclusions of law with only a few minor alterations, the district court held that "[t]he convictions of Arlt, Wren and Hill of conspiracy to aid and abet the manufacture of methamphetamine, conspiracy to launder monetary instruments, and money laundering are sufficient for probable cause by themselves." The court also noted several additional factors, relating to specific pieces of property, which bolstered its conclusion that the government had established probable cause. For example, the court noted that $123,000 is an extremely large amount of cash, that Arlt, Wren, and Hill had signature authority over several of the bank accounts, and that the vehicles were purchased with cash and placed in the name of Arlt's business, Payback Mines. The district court concluded that the government had established probable cause under both its "narcotics PROCEEDS" theory and its "money laundering" theory. Because the claimants did not introduce any evidence tending to show that the property was not subject to FORFEITURE, the court granted summary judgment in favor of the government. Arlt, Wren, and Payback Mines appeal pro se.

II.

On appeal, Arlt, Wren, and Payback Mines claim that the government lacked probable cause to institute these proceedings, that the Double Jeopardy Clause of the Fifth Amendment bars this action, that the forfeiture violates the Excessive Fines Clause of the Eighth Amendment, and that the district court lacked in rem jurisdiction over a small part of the res. Where reversal of the district court's judgment on one ground would bar further proceedings against a party opposing the government, while

reversal on other grounds would afford less than complete relief to that party, we first decide the issue which would afford complete relief. Here, the Double Jeopardy Clause argument, if successful, would result in a complete bar to the maintenance or reinstitution of these proceedings, while the relief sought on the other grounds would not. Thus, we begin with the Double Jeopardy Clause.[1] In this case, because we hold that the clause is applicable and bars further proceedings, we end with it as well.[2]

A.

The most basic element of the Double Jeopardy Clause is the protection it affords against successive prosecutions – that is, against efforts to impose punishment

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[1] The claimants did not raise the double jeopardy argument in the district court. However, they rely on the Supreme Court's decision in Austin v. United States, 113 S. Ct. 2801 (1993), which was decided after the district court's judgment in this case. The government has responded to the claimants' argument on the merits, and it has not asserted that the claimants waived the double jeopardy defense. Accordingly, we consider the issue to be properly before us.

[2] Although the claimants' relief would be incomplete if we were to rest our decision on probable cause, and thus we do not reach that ground, it seems clear that the government lacked such cause for the institution of these proceedings. In seeking to satisfy its probable cause burden, the government relies almost exclusively on Arlt's and Wren's criminal convictions. Because these convictions were not obtained until after the institution of this forfeiture action, it may not do so. See United States v. $191,910.00 in U.S. Currency, 16 F.3d 1051, 1066-71 (9th Cir. 1994).

for the same offense in two or more separate proceedings. That protection applies with equal force whether the first prosecution results in a conviction or an acquittal. See Burks v. United States, 437 U.S. 1 (1978); Brown v. Ohio, 432 U.S. 161 (1977). Whatever other abuses the Clause prohibits, at its most fundamental level it protects an accused against being forced to defend himself against repeated attempts to exact one or more punishments for the same offense. "The basis of the Fifth Amendment protection against double jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts." Abbate v. United States, 359 U.S. 187, 198-99 (1959) (opinion of Brennan, J.). This principle is "deeply ingrained in at least the Anglo-American system of jurisprudence," Green v. United States, 355 U.S. 184, 187 (1957), and, in fact, traces its roots "deep into Greek and Roman times." Bartkus v. Illinois, 359 U.S. 121, 151-52 (1959) (Black, J., dissenting).

There can be little doubt that this case implicates the core Double Jeopardy protection. Over a year after the claimants' criminal convictions, a different district judge in a different proceeding awarded the government title to nearly all of the claimants' property, because of its connection with the very offenses that resulted in criminal punishment. The forfeiture complaint in this case was based on precisely the same conduct addressed in the claimants' criminal case, and it sought to forfeit title to the claimants' property on the basis of precisely the same violations of the same statutes. In short, this civil forfeiture action and the claimants' criminal prosecution

addressed the identical violations of the identical laws; the only difference between the two proceedings was the remedy sought by the government. Yet the government could have sought both remedies without subjecting Arlt and Wren to multiple and successive proceedings. It could have included a criminal forfeiture count in the indictment which led to the claimants' convictions. However, it did not choose to follow that course. Rather, it elected to pursue its forfeiture action in a separate and parallel proceeding, which was decided after the criminal trial. By doing so, the government prevented Arlt and Wren from "being able, once and for all, to conclude [their] confrontation with society" at the time of the jury's verdict. United States v. Jorn, 400 U.S. 470, 486 (1971) (opinion of Harlan, J.).

The government's actions in this case clearly raise substantial double jeopardy concerns. However, to determine whether these actions violate the Fifth Amendment, we must consider two questions: whether the civil forfeiture action and the claimants' criminal prosecution constituted separate "proceedings," and whether civil forfeiture under 21 U.S.C. s 881(a)(6) and 18 U.S.C. s 981(a)(1)(A) constitutes "punishment." If the answer to both of these questions is yes, then the government's actions constituted a successive attempt to impose punishment, in violation of the Double Jeopardy Clause.

For the reasons we have expressed above, we have little difficulty in determining that this civil forfeiture proceeding constitutes a separate "proceeding" from the prosecution which resulted in the claimants' criminal convictions. We recognize that the Second and Eleventh Circuits have recently held in cases like this one that

criminal prosecutions do not constitute separate "proceedings" from parallel civil forfeiture actions for double jeopardy purposes. See United States v. One Single Family Residence, 13 F.3d 1493, 1499 (11th Cir. 1994); United States v. Millan, 2 F.3d 17, 20 (2d Cir. 1993). Those courts relied on the fact that the forfeiture actions and criminal prosecutions took place at approximately the same time and involved the same criminal violations, and were part of a "single, coordinated prosecution." One Single Family Residence, 13 F.3d at 1499. For that reason, the Second and Eleventh Circuits refused to conclude that the parallel criminal and civil actions constituted separate "proceedings." However, we believe that the position adopted by the Second and Eleventh Circuits contradicts controlling Supreme Court precedent as well as common sense.

We fail to see how two separate actions, one civil and one criminal, instituted at different times, tried at different times before different factfinders, presided over by different district judges, and resolved by separate judgments, constitute the same "proceeding."[3] In ordinary legal parlance, such actions are often characterized as "parallel proceedings," but not as the "same proceeding." A forfeiture case and a criminal prosecution would constitute the same proceeding only if they were brought in the same indictment and tried at the same time.[4] The

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[3] Cf. Abbate, 359 U.S. at 202 (Black, J., dissenting) ("The legal logic used to prove one thing to be two is too subtle for me to grasp.").

[4] We do not mean to suggest that the Double Jeopardy Clause prevents a forfeiture count from being tried separately from other criminal counts based on the same offense if the defendant consents to separate trials. Nor do we express any

government could have sought criminal forfeiture in this case pursuant to 18 U.S.C. ss 982, 3554 and 21 U.S.C. s 853. If it had done so and included the forfeiture count in the same indictment as the other criminal counts and then proceeded to trial against the defendants on all counts, the forfeiture case and the criminal prosecution would have constituted the "same proceeding."[5] However, the government chose to proceed against the claimants on two separate fronts – in two separate, parallel proceedings. Because the district court followed the customary practice and held the civil action in abeyance pending the outcome of the criminal prosecution, the government obtained a significant advantage: if it succeeded in the criminal case it could obtain summary judgment based on the conviction (assuming of course that it had probable cause at the time it instituted the forfeiture action), while if it lost it could still seek forfeiture and urge that the more lenient standards applicable in civil proceedings applied. See 1 David B. Smith, Prosecution and Defense of Forfeiture Cases, P 10.01, at 10-4 to 10-5 (1993) (noting that it is to the government's advantage to have the civil forfeiture action heard after the criminal case). We believe that such a coordinated,

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view as to bifurcated proceedings before the same fact-finder and presiding judicial officer.

[5] Such an attempt to impose multiple punishments in the same proceeding would satisfy the Double Jeopardy Clause so long as the legislature intended to impose both criminal forfeiture and the more standard criminal penalties for a violation of the criminal statutes at issue here. See Missouri v. Hunter, 459 U.S. 359 (1983). The issue in such a case would simply be one of statutory construction.

manipulative prosecution strategy heightens, rather than diminishes, the concern that the government is forcing an individual to "run the gantlet" [sic] more than once. Green, 355 U.S. at 190. We are not willing to whitewash the double jeopardy violation in this case by affording constitutional significance to the label of "single, coordinated prosecution."[6]

In fact, the Supreme Court has made clear that parallel actions, instituted at about the same time and involving the same criminal conduct, constitute separate proceedings for double jeopardy purposes. See Jeffers v. United States, 432 U.S. 137 (1977). In Jeffers, the government initiated parallel criminal actions against the same defendant based on the same conduct by bringing two

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[6] Were we to consider successive attempts to exact punishment to constitute the "same proceeding" under the Double Jeopardy Clause simply because they were brought as part of a "single, coordinated prosecution," we would be encouraging one of the worst abuses of prosecutorial power – the government's coordinated use of multiple proceedings to harass or exhaust particular defendants. In one prominent recent example, the federal government unsuccessfully sought to engage in a coordinated campaign of multiple prosecutions in an attempt to shut down one of the largest retail distributors of sexually oriented literature in the United States. See United States v. P.H.E., Inc., 965 F.2d 848, 850-53 (10th Cir. 1992) (describing this campaign); PHE, Inc. v. United States Dep't of Justice, 743 F. Supp. 15, 17-20 (D.D.C. 1990) (same). In the cited cases, the Tenth Circuit ordered a hearing regarding whether an indictment arising from this scheme should be dismissed on the grounds of prosecutorial vindictiveness, see 965 F.2d at 860, and the District Court for the District of Columbia issued a preliminary injunction against further prosecution of the scheme. See 743 F. Supp. at 27.

separate indictments on the same day. One indictment charged a conspiracy to distribute heroin and cocaine, in violation of 21 U.S.C. ss 841(a)(1) and 846. The other indictment charged Jeffers with conducting a continuing criminal enterprise to violate the drug laws, in violation of 21 U.S.C. s 848. Jeffers opposed the government's motion to join the offenses for trial, and the district court denied the motion. After the first jury convicted Jeffers of the conspiracy count, he moved to dismiss the continuing criminal enterprise case on double jeopardy grounds. The district court held that 21 U.S.C. ss 846 and 848 constituted separate offenses for double jeopardy purposes, and accordingly denied the motion. The Seventh Circuit affirmed on the same ground.

In affirming the judgment of Seventh Circuit, the Supreme Court explicitly rejected that court's reasoning. It held that 21 U.S.C. s 846 was a lesser included offense of 21 U.S.C. s 848. Accordingly, the two statutes stated the "same offense" under the Blockburger test, and the second and separate prosecution would ordinarily have been barred by the Double Jeopardy Clause. See Jeffers, 432 U.S. at 147-51 (plurality opinion); id. at 158 (Stevens, J., dissenting in part and concurring in the judgment in part). However, the plurality of four justices held that, by opposing the government's motion for joinder, Jeffers had waived any objection to the maintenance of separate proceedings. See id. at 152 (plurality opinion) ("[A]lthough a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and

persuades the trial court to honor his election."). In dissent, Justice Stevens (joined by three other justices) argued that Jeffers had not waived any double jeopardy objection, and that a separate trial on the second indictment was accordingly barred. See id. at 158-60 (Stevens, J., dissenting in part and concurring in the judgment in part). In short, the decisions of eight of the nine justices in Jeffers rested on the common sense proposition that two parallel criminal cases, which unquestionably were brought as a part of a "single, coordinated prosecution," constituted "separate proceedings" for double jeopardy purposes.[7] See also Missouri v. Hunter, 459 U.S. 359, 360, 366, 367, 368, 369 (1983) (stating that there is no double jeopardy bar to the imposition of multiple punishments at a "single trial") (emphasis added); see also id. at 365 ("Because respondent has been subjected to only one trial, it is not contended that his right to be free from multiple trials for the same offense has been violated.") (emphasis added). We can discern no reason why two proceedings should be deemed one when one of the proceedings involves a criminal prosecution and the other a civil forfeiture action. We conclude, therefore, that whether or not two actions are brought as part of a "single, coordinated prosecution" is irrelevant for purposes of the Double Jeopardy Clause: a civil forfeiture action which is brought and tried separately from a criminal prosecution and is based upon the same offense constitutes a separate "proceeding." Thus, we must turn to

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[7] The ninth justice, Justice White, did not discuss this issue, because he concluded that 21 U.S.C. s 846 was not a lesser included offense of 21 U.S.C. s 848.

the question whether the forfeiture the government seeks to impose constitutes "punishment."

B.

A decade ago, the law was clear that civil forfeitures did not constitute "punishment" for double jeopardy purposes. In United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984), the Supreme Court held that the claimant's prior acquittal on criminal charges did not bar a subsequent action for forfeiture under 18 U.S.C. s 924(d). Applying the test set forth in United States v. Ward, 448 U.S. 242, 248 (1980), the Court concluded that Congress intended for forfeiture to be "a remedial civil sanction." 89 Firearms, 465 U.S. at 363. Accordingly, it held that the Double Jeopardy Clause did not apply.

The Ward test, on which the Supreme Court rested its double jeopardy holding in 89 Firearms, focused heavily on the label Congress had attached to a particular sanction. If Congress indicated a preference that the proceeding be denominated "civil" rather than "criminal," the Court would defer to that preference except in extraordinary circumstances. See Ward, 448 U.S. at 248. However, as sometimes happens, the Court changed its collective mind. It abandoned the Ward approach in United States v. Halper, 490 U.S. 435 (1989). There, the Court held that "the labels 'criminal' and 'civil' are not of paramount importance" in determining whether a sanction constitutes punishment for double jeopardy purposes: "The notion of punishment, as we understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction

constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads." Id. at 447-48. Applying these principles, the Court adopted a new test for determining whether a nominally civil sanction constitutes "punishment" for double jeopardy purposes: "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." Id. at 448 (emphasis added). Just last year it reaffirmed its new-found wisdom, emphasizing again that a sanction which is designed even in part to deter or punish will constitute punishment, regardless of whether it also has a remedial purpose. See Austin v. United States, 113 S. Ct. 2801, 2806, 2812 (1993); see also United States v. Hudson, 14 F.3d 536, 540 (10th Cir. 1994) ("Appellants contend that the above quoted language means that unless a sanction is 'solely' remedial, i.e., not serving deterrent or retributive ends, it is punishment. This position is confirmed by the recent Supreme Court decision in Austin v. United States.").

Halper involved a civil action brought under the False Claims Act. In United States v. McCaslin, 959 F.2d 786 (9th Cir.), cert. denied, 113 S. Ct. 382 (1992), we underestimated its force and refused to apply its rationale in a civil forfeiture action brought under 21 U.S.C. s 881(a)(7). We held that "Halper has no application to the very ancient practice by which instrumentalities of a crime may be declared forfeit to the government." McCaslin, 959 F.2d at 788. However, in its subsequent decision in Austin, the Supreme Court said that we were wrong and directly rejected our McCaslin analysis. In

Austin, the Court specifically applied the Halper test to determine whether a civil forfeiture under 21 U.S.C. ss 881(a)(4) & (a)(7) constituted "punishment," and it concluded that those provisions did in fact impose punishment under that test. See Austin, 113 S. Ct. at 2812 ("In light of the historical understanding of forfeiture as punishment, the clear focus of ss 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood these provisions as serving to deter and to punish, we cannot conclude that forfeiture under ss 881(a)(4) and (a)(7) serves solely a remedial purpose.") (citing Halper, 490 U.S. at 448).

As the government notes, the specific holding in Austin was that the Eighth Amendment's Excessive Fines Clause applies to civil forfeiture actions. However, in determining whether the Excessive Fines Clause applied, the Court found it necessary to determine, as we are required to determine here, whether the forfeiture statutes at issue constituted "punishment." It employed the Halper test – the same test it had used to decide whether a civil monetary penalty constituted "punishment" for purposes of the Double Jeopardy Clause – in making that determination. We believe that the only fair reading of the Court's decision in Austin is that it resolves the "punishment" issue with respect to forfeiture cases for purposes of the Double Jeopardy Clause as well as the Excessive Fines Clause. In short, if a forfeiture constitutes punishment under the Halper criteria, it constitutes "punishment" for purposes of both clauses.[8] See Smith,

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[8] To make it clear, we hold only that because the method of determining whether the forfeiture constitutes punishment is

supra, P 12.10[2], at 12-131 ("The Supreme Court's decision in Austin v. United States, makes it clear that Halper's double jeopardy protections do apply to the vast majority of civil forfeiture cases.") (footnote omitted). In light of the decision in Austin, and applying the Halper test here, we find the conclusion inescapable that civil forfeiture under 18 U.S.C. s 981(a)(1)(A) and 21 U.S.C. s 881(a)(6) constitutes "punishment" which triggers the protections of the Double Jeopardy Clause.

The government argues that the Austin Court's reasoning does not apply to the FORFEITURES in this case. It asserts that this FORFEITURE involves only narcotics PROCEEDS, and that such a FORFEITURE is entirely remedial. The government's position finds support in a recent Fifth Circuit case. See United States v. Tilley, 18 F.3d 295, 300 (5th Cir. 1994) (stating that the FORFEITURE of illegal PROCEEDS does not constitute punishment).[9] We nonetheless reject that argument. We do so because

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identical, the answer to the question whether a particular forfeiture constitutes punishment will always be the same for purposes of the Double Jeopardy Clause and the Eighth Amendment. Whether a violation of either clause exists involves factors that are different with respect to each clause. Thus, even though we may conclude that a particular forfeiture may involve "punishment," we could still conclude, depending on the facts in the case before us, that both clauses were violated, neither clause was violated, or a violation of one but not the other occurred.

[9] The government also relies on the Fourth Circuit's pre-Austin decision in United States v. Borromeo, 995 F.2d 23, 27 (4th Cir. 1993). For the reasons set forth in the text, we believe that Borromeo does not survive Austin.

the government fails to recognize the legal standard that Austin established.

Under Austin, in order to determine whether a forfeiture constitutes "punishment," we must look to the entire scope of the statute which the government seeks to employ, rather than to the characteristics of the specific property the government seeks to forfeit. The government appears to assume that we must determine in each case whether the particular forfeiture is so excessive in relation to any remedial goal that it must be denominated as "punishment." However, the Austin Court explicitly refused to apply such a case-by-case approach to determining whether a forfeiture constitutes "punishment." See Austin, 113 S. Ct. at 2812 n. 14. Rather, largely because "forfeiture statutes historically have been understood as serving not simply remedial goals but also those of punishment and deterrence," id., the Court held that any determination of whether those forfeitures constitute "punishment" must look to the requirements of the forfeiture statute as a whole. See Smith, supra, P 12.10 at 12-13 ("the Austin Court thought that in the forfeiture context it made sense to focus on the forfeiture statute as a whole."). In so doing, the Court adopted a categorical approach to "punishment" determinations in the forfeiture context, much like the categorical approach it has adopted for determining whether a particular statute defines a "violent felony" for purposes of the Firearms Owners' Protection Act. See Taylor v. United States, 495 U.S. 575, 600-02 (1990); see also United States v. Sherbondy, 865 F.2d 996, 1005-1010 (9th Cir. 1988).[10] To

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[10] The Court's decision in Austin to focus on the forfeiture statute, rather than on the particular conduct alleged by the

determine whether the forfeiture the government seeks to impose in these proceedings constitutes "punishment," we must focus on the characteristics of the forfeiture statutes on which it relies.

While the government appears to rely principally on its argument that the res consists entirely of illegal PROCEEDS,[11] we will also construe its argument, generously, as contending that the FORFEITURE statutes involved are limited to the FORFEITURE of illegal PROCEEDS, and that they therefore do not impose "punishment." This argument not only misconceives the legal standard established in Austin but also misstates the scope of the statutes involved. In determining that FORFEITURES under ss 881(a)(4) & (a)(7) constituted "punishment" under the Halper test, the Austin Court relied on three facts. First,

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government, in determining whether the Double Jeopardy Clause applies is also consistent with its decision the same term in United States v. Dixon, 113 S. Ct. 2849, 2860 (1993). Dixon held that, to determine whether two prosecutions are for the same "offense" under the Double Jeopardy Clause, a court must look to the elements of the statutory offenses charged, rather than the conduct which is alleged to underlie these offenses in the particular case.

[11] If we were to look to the particular facts of this case, it is far from clear that we would accept the government's argument that the entire res consists of narcotics proceeds. The government apparently believes that we can conclude that money and property are derived from narcotics transactions simply because people with an interest in that property have been convicted of engaging in a narcotics conspiracy. Because, with few exceptions, the government has not provided any evidence of a more specific link between narcotics transactions and the property at issue, it would be most difficult, on the record before us, to conclude that the property consists entirely of illegal proceeds.

the Court noted that "the historical understanding of FORFEITURE as punishment" weighed heavily in favor of the conclusion that FORFEITURE continues to serve punitive purposes. Austin, 113 S. Ct. at 2812. Second, the Court discerned a punitive purpose from "the clear focus of ss 881(a)(4) and (a)(7) on the culpability of the owner." Id. According to the Austin Court, this focus was evident from the fact that the statutes "expressly provide an 'innocent owner' defense," and thus authorize FORFEITURE only where the owner is himself involved in illegal activity. Id. at 2810. Finally, the Court in Austin relied on "the evidence that Congress understood those provisions as serving to deter and punish" to support its conclusion that the ss 881(a)(4) & (a)(7) did not serve solely remedial purposes. Id. at 2812. In substantial part, this evidence consisted of the fact that "Congress has chosen to tie FORFEITURE directly to the commission of drug offenses." Id. at 2811.

Austin thus makes clear that at least three principles are relevant to determining whether a forfeiture constitutes "punishment." First, because of "the historical understanding of forfeiture as punishment," id. at 2812, there is a strong presumption that any forfeiture statute does not serve solely a remedial purpose. Second, where such a statute focuses on the culpability of the property owner by exempting innocent owners or lienholders, it is likely that the enactment serves at least in part to deter and punish guilty conduct. Finally, where Congress has tied forfeiture directly to the commission of specified offenses, it is reasonable to presume that the forfeiture is at least partially intended as an additional deterrent to or punishment for those violations of law.

These principles dictate that forfeiture under the statutes at issue in this case constitutes "punishment." The historically-based presumption that forfeiture is punishment continues to apply. Moreover, the statutes on which the government relies in this case focus on "the culpability of the owner," id., by providing an "innocent owner" defense. See 18 U.S.C. s 981(a)(2) ("No property shall be forfeited under this section to the extent of the interest of an owner or lienholder by reason of any or omission established by that owner or lienholder to have been committed without the knowledge of that owner or lienholder."); 21 U.S.C. s 881(a)(6) ("[N]o property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."). Finally, in drafting 21 U.S.C. s 881(a)(6) (directly tying forfeiture to "any violation of this subchapter") and 18 U.S.C. s 981(a)(1)(A) (directly tying forfeiture to violation of specific criminal statutes), "Congress has chosen to tie forfeiture directly" to the commission of specific offenses. Austin, 113 S. Ct. at 2811. Thus, applying the principles set forth in Austin, we must conclude that the statutes relied upon by the government in this case operate at least in part to punish and deter.

Moreover, as we mentioned, the government misrepresents the sweep of the FORFEITURE statutes it invokes in this case. Despite the government's argument, the statutes are not limited to the PROCEEDS of illegal activity. The so-called narcotics PROCEEDS FORFEITURE statute, 21 U.S.C. s 881(a)(6), applies to all money "furnished or intended to be furnished by any person in exchange for a

controlled substance" as well as to any money which is "used or intended to be used to facilitate any violation of this subchapter." Id. (emphasis added). This statutory language is not limited to criminal PROCEEDS – that is, money that has been furnished in exchange for drugs. Rather than rendering only the profits of drug dealers subject to FORFEITURE, the statute applies to nearly any money that is involved in a narcotics transaction in some fashion. In addition to narcotics PROCEEDS, the statute renders forfeitable money that someone intends to use to purchase drugs, or even money that someone intends to use to purchase a car or boat in order to facilitate an illegal narcotics transaction.

The money laundering FORFEITURE statute, 18 U.S.C. s 981(a)(1)(A), is similarly broad. It applies to any property which is "involved in" an illegal money laundering transaction. The government took pains to argue before the district court that property "involved in" a money laundering offense includes more than the actual money that is laundered. See Government's Memorandum of Contentions of Fact and Law (CR 46), at 17-20. Indeed, the government relied on a case which expressly rejected any limitation of s 981(a)(1)(A) to criminal PROCEEDS. See United States v. Certain Funds on Deposit, 769 F. Supp. 80, 84-85 (E.D.N.Y. 1991) ("As the Government contends, limiting the FORFEITURE of funds under these circumstances to the PROCEEDS of the initial fraudulent activity would effectively undermine the purpose of the FORFEITURE statute. Criminal activity such as money laundering largely depends upon the use of legitimate moneys to advance or facilitate the scheme."),

quoted in Government's Memorandum of Contentions of Fact and Law at 19.[12]

As the Supreme Court did in Austin, we conclude that the forfeiture statutes at issue here do not serve solely a remedial purpose. Accordingly, "even assuming that [these statutes] serve some remedial purpose, the Government's argument must fail." Id. at 2812 (emphasis added). The civil forfeiture the government seeks to impose constitutes "punishment." Because the government is attempting to exact this form of "punishment" in a separate proceeding from the claimants' criminal trials, this action is barred by the Double Jeopardy Clause.

III.

The Supreme Court's decision in Austin will doubtless have a significant effect on the government's manner of proceeding in many cases. Because in the case of statutes like those before us a criminal prosecution and a forfeiture action based on the same offense must now be brought in the same proceeding – that is, the same indictment – the government will often be forced to choose whether to include a criminal forfeiture count in the indictment (and thus forego the favorable burdens it would face in the civil forfeiture proceeding) or to pursue

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[12] Because the government argued vigorously in the district court that s 981(a)(1)(A) is not limited to the PROCEEDS of illegal activity, and it continues to rely on that statute in defending the district court's order of FORFEITURE, it cannot now claim that this case involves only the FORFEITURE of illegal PROCEEDS. See Russell v. Rolfs, 893 F.2d 1033, 1037-39 (9th Cir. 1990), cert. denied, 111 S. Ct. 2915 (1991).

only the civil forfeiture action (and thus forego the opportunity to prosecute the claimants criminally). If, in such cases, the government wishes both to obtain forfeiture and to impose other forms of criminal punishment, it "will have to rely to a much greater extent on criminal forfeiture." Smith, supra, P 12.10[2], at 12-131 to 12-132. It is entirely reasonable to put the government to this choice. After Austin, the law requires it.

For the foregoing reasons, the judgment of the district court is REVERSED and the case is REMANDED with instructions to dismiss with prejudice. REVERSED and REMANDED.

(3) (3)
Supreme Court, U.S.
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Nos. 94-231 and 94-243

In the Supreme Court of the United States

OCTOBER TERM, 1994

TOMMY ROSS ANDERSON AND SARAH JANE ANDERSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

JERRY WAYNE TILLEY AND SUSAN WELLS TILLEY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in treating the properties forfeited as proceeds of illegal drug sales, based on facts alleged in the forfeiture complaint, the stipulated judgment of forfeiture, and petitioners' representations on appeal.

2. Whether the Double Jeopardy Clause of the Fifth Amendment prohibits the criminal prosecution of petitioners for drug crimes, following a civil judgment of forfeiture against the proceeds of some of petitioners' narcotics activities.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-231

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UNITED STATES OF AMERICA

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 18 F.3d 295.[1] The opinion of the district court denying the motion to dismiss the indictment on double jeopardy grounds (Pet. App. 14a-20a) is unreported.

[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 94-243.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1994. A petition for rehearing was denied on May 11, 1994. Pet. App. 13a. The petition for a writ of certiorari in No. 94-231 was filed on August 8, 1994, and the petition in No. 94-243 was filed on August 9, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are under indictment for narcotics-related offenses in the United States District Court for the Northern District of Texas. Petitioners moved to dismiss those charges on the ground that their prosecution is barred by the Double Jeopardy Clause of the Fifth Amendment, because the government previously forfeited cash, securities, and other personal property claimed by petitioners. The district court denied petitioners' motion to dismiss the criminal charges. Pet. App. 14a-20a. The court of appeals affirmed. *Id.* at 1a-12a.

1. Petitioners operated a large-scale marijuana distribution organization in the Dallas, Texas, area. From 1986 until 1991, that operation allegedly sold and delivered several thousand kilograms of marijuana throughout the United States. Petitioners accumulated large amounts of wealth, as evidenced by their ownership of numerous expensive automobiles, luxury homes, jewelry, and certificates of deposit. In spite of the outward signs of wealth they displayed, petitioners reported only small amounts of taxable income to the Internal Revenue Service during the relevant years. Pet. App. 2a-3a, 14a-15a.

On July 25, 1991, the government commenced a civil action for forfeiture, pursuant to 21 U.S.C. 881(a)(6) and (7), against various items of real and personal property

held by petitioners.[2] The forfeiture complaint alleged that the items of personal property were the proceeds from the sale of illegal drugs, or were traceable to such proceeds, and that the real property was used to facilitate the storage and distribution of illegal drugs. See 94-243 Pet. 2; Pet. App. 2a-3a & nn.1-2, 15a, 21a-35a.

On October 8, 1992, while the forfeiture proceeding was pending, an indictment was returned charging petitioners and others with conspiracy to possess marijuana

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[2] 21 U.S.C. 881(a)(6) and (7) provide as follows:

(a) Subject property

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

* * * * *

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

with intent to distribute it, and to use a communication facility in the commission of a drug-related felony, in violation of 21 U.S.C. 846, and with 13 counts of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Pet. App. 2a-3a.[3]

On February 5, 1993, petitioners entered into a stipulated forfeiture agreement with the United States, by which they agreed to forfeit cash, certificates of deposit, automobiles, and other personal property with a value totalling approximately $650,000. Pet. App. 48a-61a; 94-231 Pet. App. D1-D7. Based on the stipulated forfeiture agreement, the district court entered a judgment of forfeiture; the judgment did not include forfeiture of two homes belonging to petitioners. Pet. App. 3a, 15a-16a, 62a-72a.

2. Following the stipulated forfeiture, in April 1993, petitioners filed a motion to dismiss the indictment, claiming that a criminal prosecution after the forfeiture judgment would subject them to double jeopardy. Pet. App. 3a, 16a, 73a-86a. Petitioners relied on *United States* v. *Halper*, 490 U.S. 435 (1989), in which this Court held that a civil fine could be considered "punishment" so as to make the Double Jeopardy Clause applicable, if the civil sanction were so "overwhelmingly disproportionate" to the damage caused that it could "not fairly be characterized as remedial, but only as a deterrent or retribution." *Id.* at 449.

The district court rejected petitioners' claim. Pet. App. 14a-20a. The court reasoned that if petitioners were correct, the rule of *Halper*, specifically limited by this Court to "the rare case" (490 U.S. at 449) where a

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[3] Petitioners Jerry Wayne Tilley and Tommy Ross Anderson were also charged with one count of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i).

small-gauge offender suffers a sanction grossly disproportionate to the damage he caused, would apply to virtually every case in which the government seeks forfeiture of the property of drug traffickers. Pet. App. 18a-19a.

3. The court of appeals affirmed. Pet. App. 1a-12a. The court considered all of the personal property forfeited to represent the "proceeds" of illegal drug trafficking, based on the allegations in the forfeiture complaint as well as petitioners' argument on appeal. *Id.* at 3a n.2, 5a. The court then determined that, unlike the fine imposed in *Halper*, the forfeiture of the proceeds of illegal drug sales in this case is fairly characterized as remedial. Noting the substantial governmental and societal costs that result from trafficking in illegal drugs, the court found that the amount of illicit drug proceeds forfeited in this case was not excessive in relation to the $60 billion to $120 billion per year in estimated costs. Furthermore, because petitioners forfeited only a portion of the total proceeds they had amassed over several years, the court concluded that the amount forfeited actually failed to compensate the government fully for the entire amount of the harm the drug sales had caused. *Id.* at 7a-9a.

The court also rejected petitioners' claim that *Austin* v. *United States*, 113 S. Ct. 2801 (1993), requires that all forfeitures be considered "punishment" for double jeopardy purposes. The court noted that *Austin* held that the Excessive Fines Clause of the Eighth Amendment applies to civil forfeitures obtained pursuant to 21 U.S.C. 881(a)(4) and (7). The court, however, distinguished those forfeitures—which generally involve conveyances used to transport drugs and real estate used in drug transactions—from forfeitures involving the proceeds of criminal activity. The court explained that

the forfeiture of drug proceeds, unlike the forfeiture of facilitating property, will always be "roughly proportional to the harm inflicted upon government and society by the drug sale," because the amount of forfeitable proceeds turns on the amount of drugs sold. Pet. App. 9a-10a.

Finally, the court held that the test of *Halper* should not apply in any event to the forfeiture of illegal drug proceeds, because the government does not punish when it confiscates property that was not lawfully acquired. In such cases, "the forfeiting party loses nothing to which the law ever entitled him." Pet. App. 10a. The court explained:

> The possessor of proceeds from illegal drug sales never invested honest labor or other lawfully derived property to obtain the subsequently forfeited proceeds. Consequently, he has no reasonable expectation that the law will protect, condone, or even allow, his continued possession of such proceeds because they have their very genesis in illegal activity. * * * [T]he forfeiture of illegal proceeds, much like the confiscation of stolen money from a bank robber, merely places that party in the lawfully protected financial status quo that he enjoyed prior to launching his illegal scheme. This is not punishment "within the plain meaning of the word."

Id. at 11a-12a (quoting *Halper*, 490 U.S. at 449).

ARGUMENT

1. Petitioners contend (94-231 Pet. 17-19; 94-243 Pet. 23-27) that the court of appeals erred in concluding that the property forfeited in this case was proceeds of illegal drug sales. Petitioners contend that the district court found that the forfeited properties were "instrumen-

talities" of drug trafficking, and that the court of appeals should have ordered an evidentiary hearing on that question. There is no merit to those claims.

Contrary to petitioners' claims, the district court made no finding that the forfeited properties were instrumentalities, as opposed to proceeds, of the drug crimes. The district court broadly held that the reasoning of *United States* v. *Halper*, 490 U.S. 435 (1990), had no application to forfeiture, relying on a Ninth Circuit case decided before this Court's decision in *Austin* v. *United States*, 113 S. Ct. 2801 (1993). Pet. App. 16a-19a. The specific character of the properties or the basis for the forfeiture of each property did not figure at all in the district court's reasoning.

The court of appeals noted that the district court's order did not specify whether the personal property constituted actual proceeds of drug sales or property used in the commission of the crimes. As the court of appeals recognized (Pet. App. 3a n.2), however, the forfeiture complaint, with the accompanying affidavit that was incorporated by reference, alleged that the personal property and some of the real property sought to be forfeited were proceeds of the illegal drug sales. See Complaint for Forfeiture, Anderson R.E. Tab 6, at 9-10; Verification Affidavit, Anderson R.E. Tab 10, at 32-41; Verification Affidavit, Tilley R.E. Tab 8, at 51-56. In the stipulated forfeiture, petitioners agreed that the United States had probable cause to seize and forfeit the properties named in the complaints, with certain properties excepted, and they thereby accepted the allegations of the complaints. See Pet. App. 48a-49a; 94-231 Pet. App. D1.

Furthermore, petitioners expressly urged the court of appeals to decide the case on the theory that the forfeited properties were "proceeds" of drug activity, not

instrumentalities. See Anderson C.A. Br. 21; Tilley C.A. Br. 2, 12-15. Indeed, petitioners' strategy was to attack the district court for failing to recognize that the properties were "proceeds" of their drug activities. As the Tilley petitioners put it, the district court's purported assumption that the properties were "instrumentalities" was not "relevant to this case, because the record is absolutely devoid of evidence indicating that these properties were forfeited as 'instrumentalities,' and is replete with evidence to the contrary, i.e., that these properties were forfeited as 'proceeds' of drug transactions, which are not 'instrumentalities' of a crime, but are instead a person's reward for committing the crime." Tilley C.A. Br. 12. The Anderson petitioners made claims to the same effect. See Anderson C.A. Br. 21.[4] In light of those

[4] The Anderson petitioners argued (C.A. Br. 21) that

> [t]he fatal flaws [*sic*] in the District Court's order is its assumption that the property forfeited here was "instrumentalities" of the alleged crime. The record is devoid of any evidence supporting, much less compelling, this conclusion. Moreover, if given the opportunity through a proper hearing Appellants will demonstrate that the seized property in fact was not the instrumentalities [*sic*] of any crime. It should be noted that the forfeiture documents * * * do not establish that the forfeited property was instrumentalities of the crime and as the District Court noted * * *, the forfeiture proceedings were based on alternative theories of the property being instrumentalities of the offenses as well as proceeds from the offenses.
>
> [The case relied on by the district court] does not stand for the proposition that the forfeiture of *proceeds* of a drug offense can never constitute double jeopardy in face [*sic*] of a criminal prosecution for the same conduct.

arguments, the court of appeals correctly concluded that petitioners "waived any argument that the forfeited property was anything but proceeds." Pet. App. 3a n.2. That fact-bound ruling warrants no further review.

2. Petitioners also contend (94-231 Pet. 4-17; 94-243 Pet. 4-22) that the forfeiture of property as proceeds of an illegal drug business under 21 U.S.C. 881(a)(6) is punitive in nature and that its imposition bars a subsequent criminal prosecution for the same conduct. The court of appeals correctly rejected that claim, and further review is not warranted.

In *United States* v. *Halper*, 490 U.S. 435 (1989), the Court held that the defendant, who had previously been convicted of crimes growing out of his Medicare fraud, could not be subjected to a punitive civil penalty for those crimes without violating the Double Jeopardy Clause of the Fifth Amendment. The Court stated that it was announcing a rule for "the rare case" in which "a prolific but small-gauge offender [is subjected] to a sanction overwhelmingly disproportionate to the damages he has caused," so that the sanction "may not fairly be characterized as remedial, but only as a deterrent or retribution." 490 U.S. at 449. The Court made clear, however, that "the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis." *Id.* at 446; *id.* at 452-453 (Kennedy, J., concurring).

See also *id.* at 10 ("The forfeiture action in this case was begun and pursued with a punitive purpose, i.e., to take from Appellants property allegedly acquired by illegal drug dealing").

Halper does not support petitioners' claim that a civil forfeiture of the proceeds of drug activity—*i.e.*, the seizure of the ill-gotten profits from narcotics trafficking—must always be characterized as punitive. To the contrary, as the court of appeals noted, the forfeiture of drug proceeds under 21 U.S.C. 881(a)(6) is akin to the forfeiture of contraband or other illegal items; that action is thus clearly remedial. Nothing in *Halper* suggests that it is "punishment"—"in the plain meaning of the word," 490 U.S. at 449, or in any other sense—for the government to seize the illegally acquired profits of criminal activity. Indeed, as the court of appeals suggested (Pet. App. 11a), petitioners' legal theory, if adopted, would permit a bank robber to bar his criminal prosecution on the ground that the government has already seized the money he stole during the robbery.

Furthermore, as the court of appeals also explained, a forfeiture of drug proceeds, unlike the fine imposed in *Halper*, is not disproportionate to the amount of the damage caused by the illegal activity. The damage caused by each instance of narcotics trafficking is at least equal to, and quite probably much greater than, the illicit gain garnered by the trafficker.[5] That revenues derived from forfeitures are then used to fund the costs of detection, investigation, and prosecution of drug traffickers, and to reimburse society for the costs of combatting drug abuse and caring for its victims, only reinforces the remedial character of the forfeitures at issue. Cf. *Caplin & Drysdale, Chartered* v. *United*

[5] In fact, in this case the value of what was forfeited represented only a portion of the total proceeds taken in by petitioners' illegal business over several years. The total forfeiture was therefore far less than the costs that could be attributed to their illegal activity. Pet. App. 9a.

States, 491 U.S. 617, 629 (1989) (noting that government has legitimate interest in forfeiting a criminal's ill-gotten gains to fund a variety of law enforcement activities).

This Court's recent decision in *Austin* v. *United States*, 113 S. Ct. 2801 (1993), does not change the conclusion that the forfeiture of drug proceeds in the instant case is remedial and nonpunitive. In finding that the forfeiture provisions at issue in *Austin* (21 U.S.C. 881(a)(4) and (7)) constitute punishment for purposes of the Eighth Amendment's Excessive Fines Clause, the Court distinguished its prior holdings concerning the forfeiture of contraband or goods involved in customs violations and noted that the forfeitures in both cases were remedial. 113 S. Ct. at 2811-2812, citing *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984) (forfeiture of unlicensed firearms discourages unregulated commerce in firearms and removes from circulation firearms used outside regulated channels of commerce), and *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972) (per curiam) (forfeiture of undeclared imported merchandise prevents forbidden merchandise from circulating in the United States, and provides a reasonable form of liquidated damages). The Court also cited the same cases in observing that "[t]he Double Jeopardy Clause has been held not to apply in civil forfeiture proceedings, but only in cases where the forfeiture could properly be characterized as remedial." *Austin*, 113 S. Ct. at 2805 n.4; see also *United States* v. *United States Currency in Amount of One Hundred Forty-Five Thousand, One Hundred Thirty-Nine Dollars*, 18 F.3d 73, 75-76 (2d Cir. 1994) (forfeiture of unreported monetary instruments under 31 U.S.C. 5317(c) after criminal conviction for same conduct held remedial, where currency was "the very goods covered

by the regulation," and was therefore "the very *sine qua non* of the crime"), cert. denied, No. 93-1932 (Oct. 3, 1994).

The *Austin* Court did rest its decision in part on the fact that the forfeiture provisions involved in that case (21 U.S.C. 881(a)(4) and (7)) were tied directly to the commission of a drug offense, and on language in the legislative history referring to the inadequacy of the traditional criminal sanctions of fine and imprisonment for deterring and punishing drug offenders. 113 S. Ct. at 2811. The statutory provision at issue in this case, however, while also tied to the commission of a crime, does not seek the kind of penalty that was at issue in *Austin*—the deprivation of property that was in no way unlawful to acquire or possess, and whose value "can vary so dramatically that any relationship between the Government's actual costs and the amount of the sanction is merely coincidental." *Id.* at 2812 n.14. As the court of appeals reasoned, unlike the heavy penalty imposed in *Halper*, the forfeiture of a portion of petitioners' illegal proceeds "does not punish the defendant because it exacts no price in liberty or lawfully derived property from him." Pet. App. 11a. Accord *SEC* v. *Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994) (disgorgement order following criminal conviction for violation of securities laws not a punishment but remedial only, as it requires defendant to give up only his ill-gotten gains and does not impose an additional penalty, citing the court of appeals' decision in this case).[6]

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[6] Nor is this forfeiture similar to the tax on possession of dangerous drugs, which the Court found was a punishment for double jeopardy purposes in *Department of Revenue* v. *Kurth Ranch*, 114 S. Ct. 1937 (1994). The Court found it significant that

Moreover, petitioners would have no valid double jeopardy claim even if they were correct in their contention that the forfeiture of drug proceeds amounts to "punishment" in all cases. As this Court's cases recognize, the component of the Double Jeopardy Clause invoked by petitioners here does not prohibit the imposition of punishment *simpliciter*, but only the imposition of "multiple punishments *for the same offense*." *United States* v. *Halper*, 490 U.S. at 440 (emphasis added); *Department of Revenue* v. *Kurth Ranch*, 114 S. Ct. 1937, 1945 (1994) ("A defendant convicted and punished for an offense may not have a nonremedial civil penalty imposed against him *for the same offense* in a separate proceeding") (emphasis added). Whether two offenses are the "same" for double jeopardy purposes does not turn on whether "the same illegal conduct" was involved in both (94-243 Pet. 28), but on a comparison of the elements that the government is required to prove to prevail under each; the offenses are different if each requires proof of a fact that the other does not. See *Blockburger* v. *United States*, 284 U.S. 299 (1932); see also *United States* v. *Dixon*, 113 S. Ct. 2849 (1993) (overruling *Grady* v. *Corbin*, 495 U.S. 508 (1990)). If the forfeiture provision is considered an "offense" for double jeopardy purposes, that "offense" is not the "same" as the offenses for which petitioners are under indictment.[7]

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the tax in that case was conditioned on commission of a crime, but the tax was also exacted after the drugs had been confiscated and destroyed, and amounted to more than eight times the market value of the drugs. The assessment there clearly went far beyond merely stripping the wrongdoer of the profits of his illicit trade.

[7] The forfeiture "offense" does not require proof that petitioners engaged in narcotics trafficking. See, *e.g.*, *United States* v. *Chandler*, No. 93-2064 (4th Cir. Sept. 27, 1994), slip op. 5 ("It is not

Finally, even if the forfeitures in this case constituted "punishment," the "Double Jeopardy Clause simply is not implicated" if the criminal action is part of the same "proceeding" as the forfeiture action, because in a single proceeding "the multiple-punishment issue would be limited to ensuring that the total punishment did not exceed that authorized by the legislature." *United States* v. *Halper*, 490 U.S. at 450; see also *Missouri* v. *Hunter*, 459 U.S. 359 (1983). As the Eleventh and Second Circuits have concluded, for purposes of the Double Jeopardy Clause, "the simultaneous pursuit by the government of criminal and civil sanctions," such as the parallel actions filed by the government in this case, "falls within the contours of a single, coordinated prosecution" for which Congress has explicitly authorized the imposition of dual criminal and civil sanctions. *United States* v. *One Single Family Residence Located at 18755 North Bay Road*, 13 F.3d 1493, 1499 (11th Cir. 1994); *United States* v. *Millan*, 2 F.3d 17, 20 (2d Cir. 1993), cert. denied, 114 S. Ct. 922 (1994); but cf. *United States* v. *Torres*, 28 F.3d 1463, 1464-1465 (7th Cir. 1994)

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an element of the government's case to prove the involvement of the property's owner in the commission of the offense giving rise to the forfeiture"). And the narcotics crimes committed by petitioners—conspiracy and possession of a controlled substance with intent to distribute it—do not require proof that petitioners obtained proceeds or anything else of value. See 21 U.S.C. 841(a)(1) and 846. The fact that proceeds were derived from "some form of unlawful activity" is an element of the offense of laundering monetary instruments, see 18 U.S.C. 1956(a)(1), but that offense requires proof of a financial transaction and of the defendant's knowledge of the origin of the proceeds, *ibid.*, and it can be committed even when the property in question represents proceeds of crimes other than narcotics trafficking, see 18 U.S.C. 1956(c)(7).

(suggesting in dicta that parallel administrative and criminal actions constitute separate proceedings).[8]

3. The decision below conflicts with a recent decision by the Ninth Circuit in which that court held that the forfeiture of drug proceeds under 18 U.S.C. 981(a)(1)(A) and 21 U.S.C. 881(a)(6) constitutes a punishment for double jeopardy purposes. *United States* v. *$405,089.23 U.S. Currency*, No. 93-55947 (9th Cir. Sept. 6, 1994). The Ninth Circuit in that case expressly disagreed with the Fifth Circuit's decision in the instant case, and with the Second and Eleventh Circuits' decisions holding that parallel civil and criminal actions of the type at issue here must be considered the same proceeding for purposes of the Double Jeopardy Clause. The Ninth Circuit relied on *Austin* to hold that, without regard to the specific characteristics of the property involved, forfeiture under the statutes at issue here always constitutes punishment. Following its decision in *$405,089.23 U.S. Currency*, the Ninth Circuit examined whether a civil forfeiture under 21 U.S.C. 881(a)(4)

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[8] As the Second Circuit recognized in *Millan* (2 F.3d at 20), the prohibition against imposing multiple punishments in successive proceedings is based on the concern that the government "is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding." *United States* v. *Halper*, 490 U.S. at 451 n.10. That concern is not present where, as here, the criminal prosecution is initiated before any adjudication of the parties' rights in the civil forfeiture action. To the contrary, permitting a claim of double jeopardy where, as here, the defendant has voluntarily settled or otherwise terminated a forfeiture action with full knowledge of the pendency of related criminal charges, and when he has failed successfully to bargain for dismissal of those charges, raises many of the same concerns that have led this Court to prohibit the use of double jeopardy claims "as a sword." *Ohio* v. *Johnson*, 467 U.S. 493, 502 (1984) (citing *Jeffers* v. *United States*, 432 U.S. 137 (1977)).

and (7) should be considered the "same offense" as factually related criminal offenses, and it answered that question in the affirmative, reasoning that "[b]ecause those sections incorporate the elements of criminal offenses, forfeitures pursuant to them constitute a species of greater offenses with respect to the lesser-included offenses that form the bases of the forfeitures." *United States* v. *One 1978 Piper Cherokee Aircraft*, No. 92-15350 (9th Cir. Sept. 30, 1994), slip op. 11849, 11862.[9]

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[9] Petitioners also allege (94-231 Pet. 11; 94-243 Pet. 18-19) a conflict with an earlier Fifth Circuit decision, *Wood* v. *United States*, 863 F.2d 417, 421 (1989), in which a panel of that court stated that "[f]orfeiture cannot seriously be considered anything other than an economic penalty for drug trafficking." The issue in that case, however, was whether a taxpayer was entitled to a loss deduction for money forfeited as proceeds of drug smuggling, and the court made the quoted statement in discussing whether there was a public policy rationale for denying the deduction. Whether a forfeiture is a "punishment" for double jeopardy purposes is a distinct question that was not before the court in *Wood*. In any event, any conflict between decisions of the same court is a matter for resolution by the court of appeals itself, not this Court. *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).

Petitioners also cite (94-231 Pet. 15-16; 94-243 Pet. 20-22) two state cases, *Fant* v. *State*, 881 S.W.2d 830 (Tex. Ct. App. 1994), review granted, No. 1047-94 (Tex. Oct. 12, 1994), and *State* v. *1979 Cadillac Deville*, 632 So. 2d 1221 (La. Ct. App. 1994), writ granted, No. 94-C-1077 (La. Sept. 23, 1994), which they contend conflict with the decision below. Only *Fant* v. *State*, however, reached a broad holding that forfeiture under a statute similar to the federal law at issue here always constitutes a punishment for double jeopardy purposes; *State* v. *1979 Cadillac Deville* held only that the forfeiture of the claimant's automobile was not remedial because the property was only an instrumentality and not contraband. In any case, neither of those decisions is from the highest court of the State and in each of them further review has been granted by the

We believe that the Ninth Circuit's reading of *Austin* is incorrect, and that its conclusions concerning the definition of "multiple proceedings" and the elements of the forfeiture "offense" are erroneous. The Ninth Circuit also departed from *Halper*'s directive to make a "particularized assessment" of "the sanction as applied in the individual case." 490 U.S. at 447-448. The court's interpretation of the rule of *Halper*, which was explicitly reserved for "the rare case" (*id.* at 449), expansively applies it to virtually every case in which the government seeks a civil forfeiture of a drug defendant's proceeds. See Pet. App. 19a; see also *United States* v. *One 1978 Piper Cherokee Aircraft*, No. 92-15350, slip op. 11863 (Rymer, J., concurring) (disagreeing with *$405,089.23 U.S. Currency*, but concurring "only because I am constrained to follow" it as circuit precedent).

The conflict between the Ninth Circuit's decisions and those of other courts may warrant this Court's attention, but the issue is not presently ripe for review by this Court. The government has filed a petition for rehearing and a suggestion for rehearing en banc in *$405,089.23 U.S. Currency*. It is possible that the conflict will be resolved through the en banc process, thus obviating the need for this Court's review.[10] Moreover, because petitioners have not been tried on the pending indictments, they will have an opportunity to seek this Court's review of their "multiple punishments" claim in the event review is now denied and they are ultimately convicted.

State's highest court. Those decisions therefore do not represent a final resolution of the issues binding on all the courts of the State.

[10] As shown by *One 1978 Piper Cherokee Aircraft*, the correctness of *$405,089.23 U.S. Currency* has already been called into question by one of the judges in that circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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